United States Court of Appeals

for the Second Circuit

APPENDIX

74-2627

United States Court of Appeals

For The Second Circuit

Docket No. 74-2627

PEERLESS MILLS, INC.,

Plaintiff-Appellant,

against

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Defendant and Third-Party Plaintiff-Appellee,

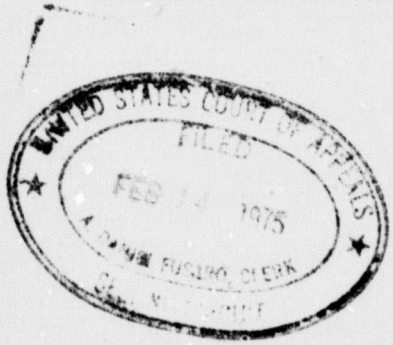
against

HERTZ, WARNER & CO., a partnership and NORMAN CARNEY, PAUL COHN, VINCENT GENNA, MARTIN GILMAN, JOEL HELD, IRVING HERTZ, LOUIS KULIKOFSKY, JAY LEYNER, MILTON LITT, CHARLES MATTHEWS, ROBERT SADLER, JAMES SADLER, ROBERT SADLIER, JAY SALUC, KENNETH SHELDON and HENRY WARNER, general partners in Hertz, Warner & Co.,

Third-Party Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX



KISSAM & HALPIN
Attorneys for Plaintiff-Appellant
120 Broadway
New York, New York 10005

DAVIS, POLK & WARDWELL
Attorneys for Defendant and Third-Party Plaintiff-Appellee
1 Chase Manhattan Plaza
New York, New York 10005

LIPKIN & WEISBERG
Attorneys for Third-Party Defendants-Appellees
225 Broadway
New York, New York 10007

PAGINATION AS IN ORIGINAL COPY

INDEX

	PAGE
Pertinent Docket Entries	1a
Summons	3a
Complaint	4a
Answer of Defendant AT&T	7a
Complaint Pursuant to Rule 14 Asserting Additional Claims Against Third-Party Defendants	9a
Hertz, Warner's Answer to Plaintiff's Rule 14 Complaint with Counterclaim	21a
EXHIBITS ANNEXED TO ANSWER TO PLAINTIFF'S RULE 14 COMPLAINT	
A—Resolution (Corporation)	34a
B—Securities Loan Agreement Between Peerless Mills, Inc. and Paul Cohen	35a
Reply to Counterclaim	37a
Pre-trial Order	39a
Findings of Fact and Conclusions of Law of United States District Judge Marvin E. Frankel	58a
Judgment Appealed From	73a
Notice of Appeal	74a
Excerpts of Trial Transcript	75a

Witnesses For Plaintiff

PAGE

Paul Robert Cohn:
- Direct 75a
- Cross 104a
- Redirect 148a
- Recross 151a

Joel Held:
- Direct 153a
- Voir Dire 176a
- Cross 182a
- Redirect 203a

Arthur Meyer:
- Direct 206a
- Voir Dire 224a
- Cross 226a
- Redirect 229a

Witnesses For Third-Party Defendants

Irving Hertz:
- Direct 231a
- Cross 241a
- Redirect 269a

Harry Warner:
- Direct 271a
- Cross 284a
- Redirect 297a
- Recross 298a

PLAINTIFF'S EXHIBITS

PAGE

1—Amended Articles of Limited Partnership of Hertz, Warner & Co. 305a

2—Letter of Peerless Mills, Inc. to American Telephone & Telegraph Co. 349a

3—Letter of New York Stock Exchange to Hertz, Warner & Co., dated May 1, 1970 ..... 350a
Report on Visit of New York Stock Exchange to Hertz, Warner & Co. 353a

4—Letter of New York Stock Exchange to Hertz, Warner & Co., dated May 11, 1970 ..... 363a

6—Letter from American Telephone & Telegraph Company to Mr. A. C. Fine, President, Peerless Mills Co., Inc. 368a

8—Letter of Hertz, Warner & Co. to Partner, dated November 21, 1969 ..... 370a

9—Letter of New York Stock Exchange to Hertz, Warner & Co., dated February 20, 1970 ..... 371a

10—Letter of New York Stock Exchange to Hertz, Warner & Co., dated April 23, 1970 ..... 372a

11—Letter of Joel Held to John H. Mittler, Jr., New York Stock Exchange, dated July 8, 1970 ..... 373a

12—Letter of Hertz, Warner & Co. to Mr. Henry Warner, dated May 28, 1970 ..... 374a

14—Letter of Lipkin, Gusrae & Held to American Telephone and Telegraph Co., dated September 15, 1970 ..... 376a

15—Letter of Lipkin, Gusrae & Held to American Telephone and Telegraph Co., dated September 15, 1970 ..... 377a

PAGE

19—Draft Partnership Agreement — Suggested Changes Re: Hertz, Warner & Co. 379a

20—Pages Read into Evidence from Deposition of Irving E. Hertz 387a
Pages Read into Evidence from Deposition of Henry Warner 429a

21—Letter of Lipkin, Gusrae & Held to Arthur Winard, Esq., dated December 29, 1970 .... 446a

25—Letter of Arthur I. Meyer, Esq., to Hertz, Warner & Co., dated July 6, 1970 ..... 449a

27—Deposition of Peerless Mills, Inc., by Margaret Fine, taken by Third-Party Defendants 450a

DEFENDANT THIRD-PARTY EXHIBITS

A—Financial Statement of Hertz, Warner & Co., November 2, 1969 ..... 483a

B—Securities Loan Agreement between Peerless Mills, Inc. and Paul Cohn 484a

K—Memorandum from Henry Warner, dated January 27, 1969 ..... 486a

United States District Court

Southern District of New York

PEERLESS MILLS, INC.,

Plaintiff,

against

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Defendant and
Third-Party Plaintiff,

against

HERTZ, WARNER & COMPANY, a partnership, et al.,

Third-Party Defendants.

Pertinent Docket Entries

Date	*Proceedings*
Mar. 1, 71	—Filed Complaint. Issued Summons.
Mar. 24, 71	—Filed summons with marshal's return.
May 3, 71	—Filed Answer to the complaint.
July 23, 71	—Filed Rule 14 complaint and jury demand.
Sept. 9, 71	—Filed Answer of 3rd party deft. Hertz, Warner & Co., Irving Hertz, and Henry Warner to pltff's Rule 14 Complaint and counterclaim.
Sept. 29, 71	—Filed Reply to Counterclaim.
May 14, 74	—Before Frankel, J. non-jury trial begun.
May 15, 75	—Trial continued.
May 16, 74	—Trial continued and concluded (3 days). Decision reserved.

Date	*Proceedings*
Oct. 31, 74	—Filed Opinion #41382–Findings of Fact and Conclusions of Law.
Nov. 6, 74	—Filed Judgment.
Dec. 4, 74	—Filed pltff. Peerless Mills, Inc. Notice of Appeal.
Dec. 4, 74	—Filed Bond for undertaking for costs on appeal.
Dec. 23, 74	—Filed notice that the record on appeal has been certified and transmitted to the USCA on 12–23–74.

Summons

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Division

Civil Action File No. 71 Civ. 910

Filed 3/1/71

Docket 3/1/71 MJS

———o———

PEERLESS MILLS, INC.,

Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Defendant.

———o———

To the above named Defendant:

You are hereby summoned and required to serve upon Kissam & Halpin, plaintiff's attorney, whose address is 120 Broadway, New York, New York 10005, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JOHN LIVINGSTON
Clerk of Court

s/ L. WEINBERG
Deputy Clerk

Date: March 1, 1971

[SEAL OF COURT]

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civ. 910

[SAME TITLE]

PLAINTIFF DEMANDS TRIAL BY JURY

Plaintiff, by its attorneys, for its complaint against defendant respectfully alleges:

First: Plaintiff, Peerless Mills, Inc. (hereinafter "Peerless"), now is and at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of Rhode Island, with its principal place of business located at Miami, Florida.

Second: Upon information and belief, defendant, American Telephone and Telegraph Company (hereinafter "AT&T"), now is and at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of New York, with its principal place of business located at New York, New York.

Third: The amount in controversy herein, exceeds, exclusive of interest and costs, the sum of ten thousand dollars ($10,000).

Fourth: At all times hereinafter mentioned, plaintiff Peerless was the owner of two thousand (2,000) shares of the Common Stock of defendant, which ownership was evidenced by a stock certificate bearing number 0471-0429, issued and registered to plaintiff by defendant.

Fifth: Upon information and belief, at all times relevant herein, defendant acted as its own transfer agent.

Sixth: On or about July 8, 1970, defendant received by registered mail, written instructions from plaintiff directing defendant to place a "stop transfer" on stock certificate number 0471-0429, registered in plaintiff's name, until further written notice from plaintiff.

Seventh: Upon information and belief, despite plaintiff's written instructions to the contrary, on or about September 17, 1970, defendant, without notification to, or authority from plaintiff, transferred plaintiff's two thousand (2,000) shares of AT&T common stock by cancelling certificate No. 0471-0429; issuing in its place a new certificate numbered 0492-8835 and delivering said new certificate to a third person.

Eighth: By reason of defendant's wrongful transfer of plaintiff's aforementioned two thousand (2,000) shares of AT&T common stock, and without any fault on the part of plaintiff, plaintiff has been deprived of its rights incidental to and arising from the ownership of said stock; has been deprived of all dividends paid on said stock since October 1, 1970, and has been deprived of the power to sell any part or all of said stock for which plaintiff has no adequate remedy at law.

Ninth: Plaintiff has demanded that defendant make restitution for all losses suffered by plaintiff as a result of defendant's wrongful transfer of plaintiff's two thousand (2,000) shares of AT&T common stock. Defendant has in the past, and continues at the time of the commencement of this action, failed and refused to make such restitution.

WHEREFORE, plaintiff prays for judgment directing:

(a) That defendant issue to plaintiff a certificate for two thousand (2,000) shares of AT&T common stock.

(b) That defendant pay to plaintiff all accrued dividends paid thereon from October 1, 1970, with interest from the dates on which each such dividend was paid.

(c) That plaintiff have such other and further relief as this Court may deem just and proper.

KISSAM & HALPIN

By ANTHONY S. GENOVESE
A Member of the Firm
Attorneys for Plaintiff
120 Broadway
New York, New York 10005
962-2000

Of Counsel:

BERLACK, ISRAELS & LIBERMAN
26 Broadway
New York, New York 10004
248-6900

Answer of Defendant AT&T

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civ. 910

[SAME TITLE]

Defendant, American Telephone and Telegraph Company ("AT&T"), by its attorneys Davis Polk & Wardwell, as and for an answer to the complaint herein:

1. Denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 1 of the complaint.

2. Admits the allegations contained in paragraph 2 of the complaint.

3. Admits the allegations contained in paragraph 3 of the complaint.

4. Denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 4 of the complaint, except admits that Stock Certificate No. 471-0429 was issued and registered in plaintiff's name.

5. Admits the allegations contained in paragraph 5 of the complaint.

6. Admits the allegations contained in paragraph 6 of the complaint.

Answer of Defendant AT&T

7. Denies the allegations in paragraph 7 of the complaint except admits that on September 17, 1970 it transferred two thousand (2,000) shares of AT&T Common Stock by cancelling Certificate No. 0471-0429, and, in its place, issuing and delivering a new certificate numbered 0492-8835 to a third person and delivering said new certificate to said third person.

8. Denies the allegations contained in paragraph 8 of the complaint.

9. Denies the allegations contained in paragraph 9 of the complaint except admits that plaintiff has requested from defendant 2,000 shares of AT&T Common Stock and defendant has declined to act on said request.

WHEREFORE, the above named defendant AT&T prays judgment dismissing the complaint with costs and disbursements of this action.

Dated: New York, New York
April 29, 1971

DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005
HAnover 2-3400

Complaint Pursuant to Rule 14 Asserting Additional Claims against Third-Party Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civ. 910

———o———

PEERLESS MILLS, INC.,

Plaintiff,

against

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Defendant and Third-Party Plaintiff,

against

HERTZ, WARNER & Co., a partnership and NORMAN CARNEY, PAUL COHN, VINCENT GENNA, MARTIN GILMAN, JOEL HELD, IRVING HERTZ, LOUIS KULIKOFSKY, JAY LEYNER, MILTON LITT, CHARLES MATTHEWS, ROBERT SADLER, JAMES SADLIER, ROBERT SADLIER, JAY SALUC, KENNETH SHELDON and HENRY WARNER, general partners in Hertz, Warner & Co.,

Third-Party Defendants.

———o———

PLAINTIFF DEMANDS TRIAL BY JURY

Plaintiff, by its attorneys, for its complaint against defendant and third-party defendants Hertz, Warner & Co., Irving Hertz and Henry Warner, respectively, alleges:

Complaint Pursuant to Rule 14 Asserting Additional Claims against Third-Party Defendants

FOR A FIRST CLAIM AGAINST DEFENDANT AMERICAN TELEPHONE AND TELEGRAPH COMPANY

First: Plaintiff, Peerless Mills, Inc. ("Peerless"), now is and at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of Rhode Island, with its principal place of business located at Miami, Florida.

Second: Upon information and belief, defendant, American Telephone and Telegraph Company ("AT&T"), now is and at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of New York, with its principal place of business located at New York, New York.

Third: The amount in controversy herein, exceeds, exclusive of interest and costs, the sum of ten thousand dollars ($10,000).

Fourth: At all times hereinafter mentioned, plaintiff Peerless was the owner of two thousand (2,000) shares of the common stock of defendant, which ownership was evidenced by a stock certificate bearing number 0471-0429, issued and registered to plaintiff by defendant.

Fifth: Upon information and belief, at all times relevant herein, defendant acted as its own transfer agent.

Sixth: On or about July 8, 1970, defendant received by registered mail, written instructions from plaintiff directing defendant to place a "stop transfer" on stock certificate number 0471-0429, registered in plaintiff's name, until further written notice from plaintiff.

Complaint Pursuant to Rule 14 Asserting Additional Claims against Third-Party Defendants

Seventh: Upon information and belief, despite plaintiff's written instructions to the contrary, on or about September 17, 1970, defendant, without notification to, or authority from plaintiff, transferred plaintiff's two thousand (2,000) shares of AT&T common stock by cancelling certificate No. 0471-0429; issuing in its place a new certificate numbered 0492-8835 and deliveing said new certificate to a third person.

Eighth: By reason of defendant's wrongful transfer of plaintiff's aforementioned two thousand (2,000) shares of AT&T common stock, and without any fault on the part of plaintiff, plaintiff has been deprived of its rights incidental to and arising from the ownership of said stock; has been deprived of all dividends paid on said stock since October 1, 1970, and has been deprived of the power to sell any part or all of said stock for which plaintiff has no adequate remedy at law.

Ninth: Plaintiff has demanded that defendant make restitution for all losses suffered by plaintiff as a result of defendant's wrongful transfer of plaintiff's two thousand (2,000) shares of AT&T common stock. Defendant has in the past, and continues at the time of the commencement of this action, failed and refused to make such restitution.

For a Second Claim Against Third-Party Defendants Hertz, Warner & Co., Irving E. Hertz and Henry Warner

Tenth: Plaintiff repeats and realleges each and every allegation of paragraphs First, Third and Fourth of the

Complaint Pursuant to Rule 14 Asserting Additional Claims against Third-Party Defendants

Complaint with the same force and effect as if fully set forth herein.

Eleventh: Upon information and belief, third-party defendant Hertz, Warner & Co. (Hertz,Warner) at all relevant times herein was and is a partnership created under an agreement of limited partnership, dated July 1, 1968, pursuant to the laws of the State of New York, having its principal place of business in New York, New York.

Twelfth: Upon information and belief third-party defendants Irving E. Hertz (Hertz) and Henry Warner (Warner) are citizens and residents of the State of New Jersey and general partners of Hertz, Warner.

Thirteenth: This claim arises out of the transactions and occurrences that are the subject matter of plaintiff's claim herein against the third-party plaintiff, AT&T.

Fourteenth: Upon information and belief, in or about April, 1969 third-party defendants Hertz and Warner initiated discussions with third-party defendant Paul Cohn concerning the possibility of Cohn becoming a general partner in Hertz, Warner.

Fifteenth: In or about June 1969, Warner, with the knowledge and consent of Hertz, made a non-negotiable offer to Cohn to become a general partner in Hertz, Warner. Pursuant to the terms of this offer, Cohn was to make a capital contribution to Hertz, Warner in the amount of $100,000.

Complaint Pursuant to Rule 14 Asserting Additional Claims against Third-Party Defendants

Sixteenth: Hertz and Warner were aware and Cohn so advised them, that if Cohn agreed to become a partner it would be necessary for him to borrow his required capital contribution from Peerless.

Seventeenth: On or about July 1, 1969, Cohn agreed to become a general partner in Hertz, Warner and to make a capital contribution of $100,000.

Eighteenth: Upon information and belief, in or about September 1969, a proposed partnership agreement dated July 1, 1969, amending the Articles of Limited Partnership of Hertz, Warner dated July 1, 1968, was circulated for signature among the proposed general and limited partners of Hertz, Warner. This proposed agreement required the general and limited partners to contribute to the capital of Hertz, Warner in stated amounts and to maintain such amounts in their capital accounts.

Nineteenth: Upon the representation that each of the general and limited partners would sign and accept the proposed 1969 partnership agreement and meet their required capital contributions, which representation was relied upon by Cohn, Cohn in or about September 1969 signed said agreement.

Twentieth: In or about October 1969, in order to meet his stated capital contribution to Hertz, Warner, Cohn borrowed 2,000 shares of AT&T stock from plaintiff Peerless and delivered said stock to Hertz, Warner.

Complaint Pursuant to Rule 14 Asserting Additional Claims against Third-Party Defendants

Twenty-first: Upon information and belief, in connection with said borrowing, third-party defendant Held, an attorney for Hertz, Warner, prepared a loan agreement covering the 2,000 shares of AT&T stock, which agreement was subsequently executed by Peerless and Cohn.

Twenty-second: By the terms of the aforesaid loan agreement, Peerless agreed to lend to Cohn 2,000 shares of AT&T stock for the purpose of enabling Cohn to meet his capital contribution in Hertz, Warner in accordance with the terms of the proposed partnership agreement.

Twenty-third: Upon information and belief, the loan agreement between Peerless and Cohn was never submitted to the New York Stock Exchange for its approval and its determination that the terms of this agreement would permit the proceeds of the loan which constituted Cohn's capital borrowing to be considered as a capital contribution to the firm of Hertz, Warner under the Rules of the New York Stock Exchange.

Twenty-fourth: Upon information and belief, the proposed July 1, 1969, partnership agreement of Hertz, Warner never became effective since it was not signed or accepted by at least seven of the proposed partners and since these partners and others failed to make their capital contributions as required by the agreement.

Twenty-fifth: Upon information and belief, Hertz, Warner failed to obtain the required written consent or ratification of all the limited partners of Hertz, Warner of the proposed admission of Cohn and several other persons

as general partners to the firm pursuant to the terms of the proposed July 1, 1969 agreement.

Twenty-sixth: By reason of the failure on the part of at least seven of the proposed partners to sign and accept the July 1, 1969 agreement, and by reason of the failure of these partners and others to make their capital contribution to Hertz, Warner and as a consequence of the failure to obtain the required approval of the limited partners of Hertz, Warner on the admission of Cohn and other new general partners to the firm in July 1969, Cohn never became a partner of Hertz, Warner.

Twenty-seventh: As a consequence of the failure of at least seven of the proposed partners to sign and accept the July 1, 1969 agreement, and by reason of the failure of these partners and others to make their capital contribution to Hertz, Warner and as a consequence of the failure to obtain the required approval of all the limited partners of Hertz, Warner on the admission of Cohn and other new general partners to the firm in July 1969 and since the New York Stock Exchange never approved the agreement between Cohn and Peerless as required by the rules of the Exchange, the 2,000 shares of AT&T common stock owned by Peerless were wrongfully converted, retained and sold by Hertz, Warner, Hertz and Warner; and Peerless has been deprived of its rights incidental to and arising from the ownership of said stock.

Complaint Pursuant to Rule 14 Asserting Additional Claims against Third-Party Defendants

FOR A THIRD CLAIM AGAINST THIRD-PARTY DEFENDANTS HERTZ, WARNER & CO., IRVING E. HERTZ AND HENRY WARNER

Twenty-eighth: Plaintiff repeats and realleges each and every allegation of paragraphs First, Third, Fourth, Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth of the complaint with the same force and effect as if fully set forth herein.

Twenty-ninth: Upon information and belief, at the time that third-party defendant Warner proposed to Cohn that he join the firm of Hertz, Warner as a general partner, Warner, with the knowledge and acquiescence of Hertz, represented to Cohn that the firm was prospering financially and that Cohn would enjoy material benefits if he became a partner in the firm. Cohn advised Peerless of these representations.

Thirtieth: Upon information and belief, at the time that Warner was soliciting Cohn to become a partner of Hertz, Warner, Warner and Hertz knew that Hertz, Warner was suffering severe financial reversals and was, in fact, in dire financial straits. Hertz and Warner desired to solicit Cohn's membership in the firm and his capital contribution for the purpose of reducing their own capital contributions at a time when the firm was in poor financial condition.

Thirty-first: Upon information and belief, prior to July 1, 1969, Hertz and Warner knew and were, in fact, advised by Cohn that it was necessary for him to borrow the funds required to meet his capital contribution from plaintiff Peerless.

Complaint Pursuant to Rule 14 Asserting Additional Claims against Third-Party Defendants

Thirty-second: On or about July 1, 1969, Cohn agreed to become a general partner in Hertz, Warner and to make a capital contribution of $100,000.

Thirty-third: Upon information and belief, in or about September 1969, the proposed partnership agreement, dated July 1, 1969, amending the Articles of Limited Partnership of Hertz, Warner dated July 1, 1968, was circulated for signature among the proposed general and limited partners of Hertz, Warner. This proposed agreement required the general and limited partners to contribute to the capital of Hertz, Warner the stated amounts and to maintain such amounts in their capital accounts. By the terms of this proposed agreement, the required capital contributions of both Hertz and Warner were substantially reduced from the amounts required as capital contributions under the terms of the partnership agreement of July 1968, then in effect.

Thirty-fourth: Upon the representation that each of the general and limited partners would sign the proposed 1969 partnership agreement and meet their required capital contributions, and upon the representation that Hertz, Warner was prospering financially, which representations were relied upon by Cohn, Cohn in or about September 1969, signed said agreement.

Thirty-fifth: Upon information and belief, prior to the time that Cohn signed the proposed partnership agreement in September 1969, Hertz and Warner knew or had reason to know that at least seven of the proposed partners would not sign the proposed partnership agreement of July 1,

1969 and would not make their required capital contributions pursuant thereto.

Thirty-sixth: In or about October 1969, in order to meet his stated capital contribution to Hertz, Warner, Cohn borrowed 2,000 shares of AT&T stock from plaintiff Peerless and delivered said stock to Hertz, Warner.

Thirty-seventh: Upon information and belief, in connection with said borrowing, third-party defendant Held, an attorney for Hertz, Warner, prepared a loan agreement covering the 2,000 shares of AT&T stock, which agreement was subsequently executed by Peerless and Cohn.

Thirty-eighth: By the terms of the aforesaid loan agreement, Peerless agreed to lend to Cohn 2,000 shares of AT&T stock for the purpose of enabling Cohn to meet his capital contribution in Hertz, Warner in accordance with the terms of the proposed partnership agreement.

Thirty-ninth: Had Cohn and/or Peerless been informed by Hertz, Warner, Hertz or Warner:

a) that Hertz, Warner had suffered severe financial reversals and that it was in dire financial straits;

b) that at least seven of the proposed partners to the July 1, 1969 partnership agreement would not sign or accept said agreement and would not make their capital contributions pursuant thereto,

Cohn would not have agreed to become a general partner in Hertz, Warner and Peerless and Cohn would not have entered into the aforesaid loan agreement pursuant to which the 2,000 shares of AT&T stock were delivered to Hertz, Warner for the purpose of meeting Cohn's capital contribution.

Complaint Pursuant to Rule 14 Asserting Additional Claims against Third-Party Defendants

Fortieth: Subsequent to the time that Peerless delivered its 2,000 shares of AT&T stock to Hertz, Warner pursuant to the aforesaid loan agreement with Cohn, at least seven of the proposed partners of Hertz, Warner refused to recognize the July 1, 1969 partnership agreement as being effective, refused to sign said agreement and refused to make their required capital contributions thereunder.

Forty-first: On or about September 21, 1970, the 2,000 shares of AT&T stock delivered by Peerless pursuant to the aforesaid loan agreement were sold at the direction of Hertz.

Forty-second: Upon information and belief, five months after Peerless delivered its 2,000 shares of AT&T stock pursuant to the aforesaid loan agreement, Hertz, Warner entered voluntary liquidation and commenced winding up the business of the firm as a result of the financial reversals that it has suffered.

Forty-third: By reason of the material misrepresentations as to the financial condition of the firm made by Hertz, Warner, Warner and Hertz, and the failure to disclose that several partners would not make their required capital contributions, the proposed July 1969 partnership agreement was ineffective and the securities loan agreement between Peerless and Cohn became null and void. As a consequence, Hertz, Warner, Warner and Hertz through their fraudulent misrepresentations and nondisclosures wrongfully converted the 2,000 shares of AT&T common stock to their own benefit and use, and Peerless has been deprived of its rights incident to and arising from the ownership of said stock.

Complaint Pursuant to Rule 14 Asserting Additional Claims against Third-Party Defendants

WHEREFORE, plaintiff prays for judgment directing that:

a) Defendant AT&T issue to plaintiff a certificate for 2,000 shares of AT&T common stock;

b) Defendant AT&T pay to plaintiff all accrued dividends paid thereon from October 1, 1970 with interest from the date on which such dividend was paid;

c) Third-party defendant Hertz, Warner deliver to plaintiff 2,000 shares of AT&T common stock wrongfully and fraudulently converted together with all accrued dividends paid thereon from October 1, 1970 with interest from the dates on which each dividend was paid;

d) Third-party defendants Hertz and Warner, jointly and severally, deliver to plaintiff 2,000 shares of AT&T common stock wrongfully and fraudulently converted together with all accrued dividends paid thereon from October 1, 1970 with interest from the dates on which each dividend was paid;

e) Plaintiff have such other and further relief as this Court may deem just and proper.

KISSAM & HALPIN

By ANTHONY S. GENOVESE
A Member of the Firm
Attorneys for Plaintiff
Peerless Mills, Inc.
120 Broadway
New York, New York 10005
962-2000

Hertz, Warner's Answer to Plaintiff's Rule 14 Complaint with Counterclaim

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civ. 910

[SAME TITLE]

Third-Party Defendants, Hertz, Warner & Co. ("Hertz, Warner"), Irving Hertz ("Hertz"), and Henry Warner ("Warner"), by their attorneys, Willkie Farr & Gallagher, answering the Complaint, pursuant to Rule 14, of plaintiff, Peerless Mills, Inc. ("Peerless"), allege upon information and belief:

1. Deny having any knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in paragraph 1 of the Complaint.

2. Deny having any knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in paragraph 2 of the Complaint.

3. Deny having any knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in paragraph 3 of the Complaint.

4. Deny each and every allegation contained in paragraph 4 of the Complaint.

5. Deny having any knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in paragraph 5 of the Complaint.

Hertz, Warner's Answer to Plaintiff's Rule 14 Complaint with Counterclaim

6. Deny having any knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in paragraph 6 of the Complaint.

7. Deny having any knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in paragraph 7 of the Complaint.

8. Deny each and every allegation contained in paragraph 8 of the Complaint.

9. Deny having knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in paragraph 9 of the Complaint.

10. With respect to the allegations contained in paragraph 10 of the Complaint, defendants Hertz, Warner, Irving Hertz and Henry Warner repeat and reallege their answers herein to paragraphs 1, 3 and 4 of the Complaint with the same full force and effect as if hereinafter again set forth at length.

11. Deny each and every allegation contained in paragraph 11 of the Complaint except admit that Hertz, Warner & Co. is a limited partnership created under an Agreement of Limited Partnership dated July 1, 1969, pursuant to the laws of the State of New York, having its principal place of business in New York, New York.

12. Deny each and every allegation contained in paragraph 12 of the Complaint except admit that Henry Warner is a resident of New Jersey and that Hertz and Warner are general partners of Hertz, Warner at the relevant times herein.

Hertz, Warner's Answer to Plaintiff's Rule 14 Complaint with Counterclaim

13. Deny having any knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in paragraph 13 of the Complaint.

14. Deny each and every allegation contained in paragraph 14 of the Complaint.

15. Deny each and every allegation contained in paragraph 15 of the Complaint.

16. Deny each and every allegation contained in paragraph 16 of the Complaint.

17. Admit the allegations contained in paragraph 17 of the Complaint.

18. Deny each and every allegation contained in paragraph 18 of the Complaint except admit that an agreement amending the Articles of Limited Partnership of Hertz, Warner was circulated for signature among the general limited partners of Hertz, Warner. Such agreement contained provisions relating to partners' capital accounts.

19. Deny each and every allegation contained in paragraph 19 of the Complaint except admit that Paul Cohn signed the Hertz, Warner partnership agreement.

20. Admit the allegations contained in paragraph 20 of the Complaint.

21. Deny having any knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in paragraph 21 of the Complaint except admit that a loan agreement coverir the 2,000 shares

of AT&T stock was executed by Peerless and Cohn. On or about October 24, 1969, the board of directors of the plaintiff duly adopted a resolution, a copy of which is annexed hereto as "Exhibit A". The "Securities Loan Agreement" referred to in the plaintiff's Complaint is attached hereto as "Exhibit B".

22. Deny each and every allegation contained in paragraph 22 of the Complaint except admit that by the "Securities Loan Agreement" referred to in paragraph 22 of the plaintiff's Complaint, the plaintiff *inter alia*:

> (a) surrendered all property rights in 2,000 shares of the common stock of AT&T referred to in its Complaint;
>
> (b) authorized Mr. Paul Cohn to contribute the same to Hertz, Warner & Co. as a contribution of capital by him and to make the same available to Hertz, Warner & Co. as part of the firm's assets; and
>
> (c) agreed that the 2,000 shares of the common stock of AT&T were to be "held, pledged, sold, transferred, disposed of or otherwise dealt with" by Hertz, Warner & Co. as "partnership property" in like manner as though Paul Cohn had so contributed or made available his own securities.

The "Securities Loan Agreement" is attached hereto as Exhibit B and defendants respectfully refer the Court to that document for its full terms and effect.

Hertz, Warner's Answer to Plaintiff's Rule 14 Complaint with Counterclaim

23. Deny having any knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in paragraph 23 of the Complaint.

24. Deny each and every allegation contained in paragraph 24 of the Complaint.

25. Deny each and every allegation contained in paragraph 25 of the Complaint.

26. Deny each and every allegation contained in paragraph 26 of the Complaint.

27. Deny each and every allegation contained in paragraph 27 of the Complaint.

28. With respect to the allegations contained in paragraph 28 of the Complaint, defendants Hertz, Warner, Hertz and Warner repeat and reallege their answers herein to paragraphs 1, 3, 4, 11, 12, 13, 14 and 15 of the Complaint with the same full force and effect as if hereinafter again set forth at length.

29. Deny each and every allegation contained in paragraph 29 of the Complaint.

30. Deny each and every allegation contained in paragraph 30 of the Complaint.

31. Deny each and every allegation contained in paragraph 31 of the Complaint.

32. Admit the allegations contained in paragraph 32 of the Complaint.

Hertz, Warner's Answer to Plaintiff's Rule 14 Complaint with Counterclaim

33. Deny each and every allegation contained in paragraph 33 of the Complaint except admit that the partnership agreement dated July 1, 1969, amending the Articles of Limited Partnership of Hertz, Warner dated July 1, 1968, was circulated for signature among the general and limited partners of Hertz, Warner. This agreement contained provisions relating to capital contributions of the partners. The capital contribution of Irving Hertz was reduced from the amount in the 1968 agreement and the capital contribution of Henry Warner was increased as compared to that under the terms of the partnership agreement of July 1968.

34. Deny each and every allegation contained in paragraph 34 of the Complaint except admit that Cohn signed the partnership agreement.

35. Deny each and every allegation contained in paragraph 35 of the Complaint.

36. Deny each and every allegation contained in paragraph 36 of the Complaint except admit that in or about October 1969 Cohn delivered 2,000 shares of AT&T stock to Hertz, Warner, having obtained them from Peerless pursuant to Exhibits A and B hereto.

37. Deny having any knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in paragraph 37 of the Complaint except admit that a loan agreement covering the 2,000 shares of AT&T stock was executed by Peerless and Cohn. On or about October 24, 1969, the board of directors of the plaintiff duly adopted a resolution, a copy of which

is annexed hereto as "Exhibit A". The "Securities Loan Agreement" referred to in the plaintiff's Complaint is attached hereto as "Exhibit B".

38. Deny each and every allegation contained in paragraph 38 of the Complaint except admit that by the "Securities Loan Agreement" referred to in paragraph 38 of the plaintiff's Complaint, the plaintiff *inter alia*:

(a) surrendered all property rights in 2,000 shares of the common stock of AT&T referred to in its Complaint;

(b) authorized Mr. Paul Cohn to contribute the the same to Hertz, Warner & Co. as a contribution of capital by him and to make the same available to Hertz, Warner & Co. as part of the firm's assets; and

(c) agreed that the 2,000 shares of the common stock of AT&T were to be "held, pledged, sold, transferred, disposed of or otherwise dealt with" by Hertz, Warner & Co. as "partnership property" in like manner as though Paul Cohn had so contributed or made available his own securities.

The "Securities Loan Agreement" is attached hereto as Exhibit B and defendants respectfully refer the Court to that document for its full terms and effect.

39. Deny each and every allegation contained in paragraph 39 of the Complaint.

40. Deny each and every allegation contained in paragraph 40 of the Complaint.

Hertz, Warner's Answer to Plaintiff's Rule 14 Complaint with Counterclaim

41. Deny each and every allegation contained in paragraph 41 of the Complaint.

42. Deny each and every allegation contained in paragraph 42 of the Complaint.

43. Deny each and every allegation contained in paragraph 43 of the Complaint.

FOR A FIRST, SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE TO THE COMPLAINT, DEFENDANTS HERTZ, WARNER & CO., IRVING HERTZ AND HENRY WARNER ALLEGE THAT:

44. The Complaint Pursuant to Rule 14 fails to state a claim upon which relief can be granted.

FOR A SECOND, SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE TO THE COMPLAINT, DEFENDANTS HERTZ, WARNER & CO., IRVING HERTZ AND HENRY WARNER ALLEGE THAT:

45. The plaintiff's claims are barred in whole or in part by the applicable Statutes of Limitations.

FOR THE THIRD, SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE TO THE COMPLAINT, DEFENDANTS HERTZ, WARNER & CO., IRVING HERTZ AND HENRY WARNER ALLEGE THAT:

46. The plaintiff's claims are barred in whole or in part by laches.

Hertz, Warner's Answer to Plaintiff's Rule 14 Complaint with Counterclaim

FOR THE FOURTH, SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE TO THE COMPLAINT, DEFENDANTS HERTZ, WARNER & CO., IRVING HERTZ AND HENRY WARNER ALLEGE THAT:

47. On or about October 31, 1969, the plaintiff executed an instrument, a copy of which is annexed hereto as "Exhibit B", under which instrument plaintiff remised, released and forever discharged the defendants of and from any claim set forth in the Complaint herein.

COUNTERCLAIM

AS AND FOR A COUNTERCLAIM AGAINST THE PLAINTIFF PEERLESS MILLS, INC., THIRD-PARTY DEFENDANT HERTZ, WARNER & CO. ALLEGES, UPON INFORMATION AND BELIEF, THAT:

48. Mr. Paul Cohn was one of the founding partners of Hertz, Neumark & Warner when the firm was formed on October 8, 1963. This first period of partnership lasted about two years. Mr. Cohn resigned his partnership voluntarily and remained with the firm as a registered representative.

49. During the summer of 1968 Mr. Cohn expressed to Mr. Warner an interest in becoming more involved in the firm's affairs. He was assigned responsibility of managing the syndication of new issues and secondaries within the firm. Mr. Cohn organized that department.

50. Mr. Cohn informed Mr. Henry Warner that he would like to be included in the partnership for the year

commencing July 1, 1969. Mr. Warner recommended that he be made a partner. No general partner disagreed and Mr. Cohn became a general partner of Hertz, Warner & Co. on July 1, 1969.

51. At the time he requested to be made a partner in Hertz, Warner & Co., Mr. Paul Cohn was well aware of the facts generally known in the securities industry, including, *inter alia*, the existence of a paperwork crisis in the industry, shortened working hours, the Wednesday closings and Hertz, Warner's program of disposing of its retail organization.

52. Mr. Cohn sought increased responsibilities and involvement when he became a partner. He requested placement in the firm's back office where he supervised the Cage operation. He actively participated as a partner.

53. In late January 1970, a meeting of Hertz, Warner & Co. was held at which Mr. Cohn was present. After a lengthy partnership meeting, Messrs. Cohn, Sadlier and Held received additional partnership points.

54. Mr. Paul Cohn's contribution to capital was made in the form of 2,000 shares of common stock of AT&T secured by him from the plaintiff pursuant to the agreement annexed hereto as "Exhibit B", whereby the plaintiff *inter alia* surrendered all property rights in the stock.

55. On or about October 24, 1969, the Board of Directors of the plaintiff duly adopted a resolution, a copy

of which is annexed hereto as "Exhibit A", authorizing its president, A. C. Fine, to loan, assign and endorse for transfer certificates representing 2,000 shares of the common stock of AT&T, registered in the name of the plaintiff.

56. On or about October 31, 1969, the plaintiff entered into a "Securities Loan Agreement," a copy of which is annexed hereto as "Exhibit B," with Mr. Paul Cohn.

57. By the "Securities Loan Agreement" referred to in paragraph 12, the plaintiff, *inter alia,*

(a) surrendered all property rights in 2,000 shares of the common stock of AT&T referred to in its Complaint;

(b) authorized Mr. Paul Cohn to contribute the same to Hertz, Warner & Co. as a contribution of capital by him and to make the same available to Hertz, Warner & Co. as part of the firm's assets; and

(c) agreed that the 2,000 shares of the common stock of AT&T were to be "held, pledged, sold, transferred, disposed of or otherwise dealt with" by Hertz, Warner & Co. as "partnership property" in like manner as though Paul Cohn had so contributed or made available his own securities.

58. The plaintiff did not at any of the times referred to in its Complaint have an ownership interest in the 2,000 shares of AT&T.

Hertz, Warner's Answer to Plaintiff's Rule 14 Complaint with Counterclaim

59. On or about May 1, 1970, plaintiff wrongfully caused 2,000 shares of the common stock of AT&T to be transferred from the name of Hertz, Warner & Co. into the name of Peerless Mills, Inc.

60. In or about May, 1970, the plaintiff received warrants in connection with AT&T shares of the value of approximately $832, which were rightfully the property of Hertz, Warner & Co. due to the transfer to Hertz, Warner & Co. of 2,000 shares of AT&T pursuant to the agreement annexed hereto as "Exhibit B".

61. As a consequence of the wrongful transfer alleged in paragraph 59, third-party defendant Hertz, Warner & Co. has been deprived of its rights incident to and arising from the ownership of said stock.

WHEREFORE, third-party defendants Hertz, Warner & Co., Irving Hertz and Henry Warner, demand judgment against the plaintiff:

(a) Dismissing the Complaint Pursuant to Rule 14 as to them;

(b) Awarding third-party defendant Hertz, Warner & Co. judgment on its claims in the amount of $832 plus interest from May 13, 1970;

(c) Awarding third-party defendant Hertz, Warner & Co. judgment directing the delivery to it of all accrued dividends paid from May 1, 1970, on 2,000 shares of the common stock of AT&T wrongfully transferred to Peerless Mills, Inc., with

interest from the dates on which each dividend was paid;

together with costs and disbursements of this action, and for such other and further relief as the Court may deem proper.

Dated: New York, New York
September 7, 1971.

WILLKIE FARR & GALLAGHER

By CHESTER J. STRAUB
A Member of the Firm
Attorneys for Third-Party
Defendants, Hertz, Warner & Co.,
Irving Hertz and Henry Warner
Office and Post Office Address:
1 Chase Manhattan Plaza
New York, N. Y. 10005
(212) 248-1000

Exhibit A Annexed to Answer to Plaintiff's Rule 14 Complaint

RESOLUTION (CORPORATION)

BE IT RESOLVED, that the President, (Name) A. C. Fine be hereby authorized to loan, assign and endorse for transfer, certificates representing 2,000 shares of American Telephone & Telegraph Co. registered in the name of this corporation.

I, Margaret Fine, Secretary of (Name of Corporation) Peerless Mills, Inc., incorporated under the laws of the State of R.I., hereby certify that the foregoing is a true copy of a resolution duly adopted by the Board of Directors of said Corporation at a meeting duly held the 24th day of October, 1969, at which a quorum was present and voting, and that the same has not been repealed or amended, and remains in full force effect and does not conflict with the by-laws of said corporation.

Date 1-31-69

(CORPORATE SEAL)

MARGARET FINE
Secretary

(Must be signed by the Secretary of Firm)

Exhibit B Annexed to Answer to Plaintiff's Rule 14 Complaint

00-00906-1-3
Paul Cohn

SECURITIES LOAN AGREEMENT

between

PEERLESS MILLS, INC. & PAUL COHN

Peerless Mills, Inc. has this day loaned to Paul Cohn 2,000 shares common stock of the American Telephone & Telegraph Co. Paul Cohn may contribute the same to the firm of Hertz, Warner & Co. (hereinafter referred to as the "Firm") as a contribution of capital by him, or make the same available to the Firm as part of the Firm's assets and such securities may be held, pledged, sold, transferred, disposed of or otherwise dealt with by the Firm as partnership property in like manner as though Paul Cohn had so contributed or made available his own securities. Paul Cohn individually undertakes and agrees that on November 1, 1970, he will repay said loan by returning to Peerless Mills, Inc. a like amount of stock or cash and will pay or assign to Peerless Mills, Inc. the amount of any cash or stock dividends or rights which Peerless Mills, Inc. would otherwise lose by reason of the transaction evidenced hereby. Unless otherwise specified in writing, by November 1, 1970, this agreement shall automatically be extended for an additional one-year period. Peerless Mills, Inc. shall have the right to have returned to them by Paul Cohn at any time on demand securities of the same kind and amount as any of the securities enumerated in this agreement, provided that he assigns and delivers to Paul Cohn in place

Exhibit B Annexed to Answer to Plaintiff's Rule 14 Complaint

thereof, other securities of equal market value or cash equal to the market value of the securities so returned, and all the provisions of this agreement shall apply to such substituted securities or cash to the same extent as though they or it were all or part of the securities initially loaned.

Peerless Mills, Inc. does not reserve or retain any property right in the cash and stock loaned but their rights hereunder shall consist solely of the contractual right against Paul Cohn individually to the repayment of said loan in the manner hereinabove specified; and the Firm shall not be under any liability to Peerless Mills, Inc. by reason of this agreement nor shall it be under any obligation whatsoever to Peerless Mills, Inc. on account of said cash and stock or any interest thereon, stock dividends or rights received by Paul Cohn or the Firm.

The term "the Firm", as used in this agreement shall mean the firm of Hertz, Warner & Co., as presently constituted or as it may be hereafter constituted from time to time and also any firm which may succeed to its business.

PAUL COHN, Borrower

PEERLESS MILLS, INC.,

By: A. C. FINE, President

[SEAL]

Dated: January 31, 1969

Reply to Counterclaim

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civ. 910

[SAME TITLE]

Plaintiff, by its attorneys, for its reply to the counterclaim of Hertz, Warner & Co. set forth in paragraphs 48 through 61 of the Answer of third-party defendants Hertz, Warner & Co., Irving Hertz, and Henry Warner, alleges:

1. Denies the allegations contained in paragraph 48 of the Answer herein, except admits that Paul Cohn was a founding partner of Hertz, Neumark & Warner and that he resigned his partnership and remained in the firm as a registered representative.

2. Denies the allegations contained in paragraph 54 of the Answer herein, except admits that Paul Cohn's contribution to capital was made in the form of 2,000 shares of common stock of American Telephone and Telegraph secured by him from plaintiff pursuant to the agreement annexed to the Answer as "Exhibit B".

3. Denies knowledge or information sufficient to form a belief as to the allegations set forth in paragraph 49 of the Answer, except admits that Paul Cohn organized and managed the department dealing with new issues and secondaries.

4. Denies knowledge or information sufficient to form a belief as to the allegations set forth in paragraph 50 of the Answer except denies that Paul Cohn became a general partner of Hertz, Warner & Co. on or before or subsequent to July 1, 1969.

Reply to Counterclaim

5. Denies knowledge or information sufficient to form a belief as to the allegations set forth in paragraph 52 of the Answer except denies that Paul Cohn became a partner or actively participated as a partner in the firm of Hertz, Warner & Co.

6. Denies knowledge or information sufficient to form a belief as to the allegations set forth in paragraphs 51 and 53 of the Answer.

7. Admits the allegations set forth in paragraphs 55 and 56 of the Answer.

8. Denies the allegations set forth in paragraph 57 of the Answer and respectfully refers the Court to the "Securities Loan Agreement" annexed to the Answer as "Exhibit B" for a complete and accurate statement of its contents.

9. Denies the allegations set forth in paragraphs 58, 59, 60 and 61 of the Answer.

WHEREFORE, plaintiff prays that third-party defendant Hertz, Warner & Co.'s counterclaim be dismissed and further prays for judgment on its complaint and for such other and further relief as this court may deem just and proper.

KISSAM & HALPIN

By ANTHONY S. GENOVESE
A Member of the Firm
Attorneys for Plaintiff Peerless Mills, Inc.
120 Broadway
New York, New York 10005
962-2000

Pretrial Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civ. 910

[SAME TITLE]

At the direction of United States Magistrate Martin D. Jacobs, the attorneys for the respective parties submit the following pretrial order. It is agreed that the trial of this action is before a jury and shall be based upon this order and the pleadings in this case and any amendments thereto.

Facts Not In Dispute

The parties hereby stipulate that the following facts are not in dispute. Each party reserves the right to object to the materiality of any such stipulated fact and its relevancy to the issues.

1. Plaintiff, Peerless Mills, Inc. (Peerless) is a Rhode Island corporation with principal place of business in Miami, Florida.

2. Defendant American Telephone and Telegraph Company (AT&T) is a New York corporation with principal place of business in New York, New York.

3. Third-party defendant Hertz, Warner & Co. (HW&Co.) is a partnership created under an agreement of limited partnership, dated July 1, 1968, pursuant to the laws of the State of New York having its principal place of business in New York, New York.

4. Defendant AT&T acts as its own transfer agent.

5. In November 1969 and continuing until July 30, 1970, third-party defendant HW&Co. was the registered owner of 2000 shares of AT&T common stock which ownership was evidenced by a 2000-share certificate numbered 430028.

6. HW&Co. became the registered owner of the 2000-share certificate numbered 430028 as a result of a transfer from Peerless of two 1000-share certificates of AT&T common stock numbered 078137 and 078138 to HW&Co. on November 19, 1969.

7. On January 30, 1970, HW&Co. transferred its 2000-share certificate of AT&T common stock numbered 430028 to Cede & Co.

8. As of April 30, 1970 HW&Co. was the registered owner of 2000-shares of AT&T common stock which ownership was evidenced by twenty 100-share certificates numbered 889624, et al.

9. On May 1, 1970 Peerless became the registered owner of 2000 shares of AT&T common stock which ownership was evidenced by a 2000-share certificate numbered 0471-0429 as a result of a transfer from HW&Co. to Peerless of the twenty 100-share certificates numbered 889624, et al.

10. The May 1, 1970 transfer of twenty 100-share certificates of AT&T stock in the name of HW&Co. into a 2000-share certificate of AT&T stock in the name of Peerless was caused by Robert Sadlier with the approval of Paul Cohn without the knowledge, approval or authorization of any other partner of HW&Co. Cohn's purpose with respect to the transfer was to prevent the negotiability by HW&Co. of 2000 shares of AT&T common stock.

11. Cohn did not see the twenty 100-share certificates of AT&T stock which were transferred to Peerless and he did not know where the twenty 100-share certificates were located before they were transferred.

12. In or about July 1970 and continuing thereafter, plaintiff Peerless was the registered owner of 2000 shares of AT&T common stock which ownership was evidenced by stock certificate No. 0471-0429.

13. On or about July 6, 1970, Peerless placed a "stop transfer" on stock certificate No. 0471-0429 then registered in its name.

14. The "stop transfer" order sent by Peerless to AT&T was duly recorded on the books of AT&T on or about July 6, 1970.

15. On or about July 7, 1970, AT&T received a letter from Peerless confirming the "stop transfer" order.

16. On or about September 15, 1970, HW&Co. presented stock certificate No. 0471-0429 registered in the name of Peerless to AT&T and requested that this stock be transferred from Peerless to HW&Co. At the time of this request, HW&Co. certified that Peerless had no in-

terest in the securities and that HW&Co. would indemnify and hold AT&T harmless for any damages incurred by reason of the transfer.

17. On September 17, 1970, AT&T, acting as its own transfer agent, transferred 2000 shares of AT&T stock registered in the name of Peerless to HW&Co. by cancelling certificate No. 0471-0429 and issuing a new certificate in its place numbered 0492-8835.

18. At the time of the cancellation and transfer of the stock certificate No. 0471-0429, the stop transfer on said certificate had not been withdrawn by plaintiff Peerless either orally or in writing, and AT&T was aware of said stop transfer.

19. At the time of the transfer of the 2000 shares of AT&T common stock from Peerless to HW&Co., AT&T did not notify plaintiff that it had transferred the 2000 shares of AT&T stock contrary to the "stop transfer" order.

20. On September 15, 1970, Joel Held, on behalf of HW&Co., wrote to AT&T stating that "in view of the nature and complexity of the situation surrounding the aforementioned 2000 shares of stock, it is of the utmost urgency that our client obtain the requested documents as soon as possible." After the receipt of this letter, AT&T did not make any inquiry into "the nature and complexity of the situation" at the time it transferred the 2000 shares of AT&T common stock from Peerless to HW&Co.

21. AT&T's legal department acknowledged that a mistake was made in processing the transfer of the 2000 shares of AT&T stock from Peerless to HW&Co.

22. On September 21, 1970, AT&T mailed the 2000 shares of AT&T stock to HW&Co.

23. Peerless was aware on or before October 22, 1970 that the 2000 shares of AT&T stock was transferred from Peerless to HW&Co. Peerless did not, at any time, instruct AT&T to "stop transfer" on the 2000-share certificate, numbered 04928835, registered in the name of HW&Co.

24. In its *Stock and Bond Instructions—General Information,* at paragraph 1.02, AT&T states that when a transfer is requested, it is the responsibility of the transfer office to ascertain whether or not the transfer is duly authorized and to make only those transfers which are so authorized.

25. In its *Stock and Bond Instructions,* at paragraph 2.10, AT&T states that requests to remove stop transfers must be in writing. Proper written authority is required in order to remove the stop transfer. Moreover, in every case where the stop has been placed for a legal reason, the stop should not be withdrawn without the consent of the legal department.

26. In or about April 1969, Paul Cohn (Cohn), Hertz and Warner commenced discussions concerning Cohn's possible admission to the firm of HW&Co. as a partner.

27. During the period in which Cohn discussed his status with Hertz and Warner, he also discussed his possible admission as a partner to HW&Co. with plaintiff Peerless.

28. Cohn was expected to make a capital contribution of $100,000 if admitted as a partner to the firm of HW&Co.

29. Peerless agreed to lend Cohn $100,000 for the express purpose of enabling Cohn to meet his capital contribution in HW&Co. in accordance with the terms of the proposed July 1, 1969 HW&Co. partnership agreement.

30. During the period July 1 through November 30, 1969, the proposed July 1, 1969 HW&Co. partnership agreement was circulated for signature.

31. Cohn signed the proposed July 1, 1969 partnership agreement.

32. In or about October 1969, Cohn and Peerless delivered 2000 shares of AT&T common stock to HW&Co. as Cohn's capital contribution pursuant to the terms of the proposed July 1, 1969 HW&Co. partnership agreement.

33. The loan agreement between Peerless and Cohn was never submitted to the New York Stock Exchange for its approval and its determination that the terms of this agreement would permit the proceeds of the loan which constituted Cohn's capital borrowing to be considered as a capital contribution to the firm of HW&Co. under the rules of the New York Stock Exchange.

34. HW&Co. did not obtain the written consent or ratification of all the then limited partners of HW&Co. on the proposed admission of Cohn as a general partner to the firm of HW&Co. pursuant to the terms of the proposed July 1, 1969 agreement.

35. Arthur Meyer, Joseph Blau, Diana Fisher, Philip Fisher, Sydelle Meyer, Marjorie Alfus, Lawrence Blau and Sydelle Meyer as trustee of the Wendy Alfus trust and as trustee of the Mitchell Alfus trust, then limited partners of HW&Co., refused to sign and accept the proposed July 1, 1969 HW&Co. partnership agreement.

36. The proposed July 1, 1969 HW&Co. partnership agreement was never filed in the New York County Clerk's Office.

37. Arthur Meyer, Joseph Blau, Diana Fisher, Philip Fisher, Sydelle Meyer, Marjorie Alfus, Lawrence Blau and Sydelle Meyer as trustee of the Wendy Alfus trust and as trustee of the Mitchell Alfus trust composed the so-called "Meyer-Blau group".

38. Under the terms of the proposed July 1, 1969 partnership agreement, it was represented that the "Meyer-Blau group" would make a total capital contribution of $1,857,000 to the firm of HW&Co.

39. The "Meyer-Blau group" advised HW&Co. that they considered their rights and obligations governed solely by the HW&Co. partnership agreement, dated July 1, 1968.

40. For the fiscal year ending June 30, 1968 HW&Co. earned $2,555,000.

41. For the six month period ending December 31, 1968, HW&Co. earned $1,008,505.

42. For the fiscal period July 1, 1968 through January 31, 1969, HW&Co. earned $1,145,594.

43. For the fiscal year July 1, 1968 through June 30, 1969, HW&Co. earned $94,414.

44. During the period February, 1969 through June 3[illegible] 1969, HW&Co. lost $1,051,180.

45. The HW&Co. partnership tax return for the period July 1, 1968 through June 30, 1969 shows a loss for that fiscal year of $104,711.

46. Prior to the time Cohn signed the proposed July 1, 1969 HW&Co. partnership agreement, Hertz and Warner received monthly financial statements and reports of HW&Co. reflecting the losses during that period.

47. Joel Held left the employ of HW&Co. on or about May 30, 1970.

Plaintiff's Contentions As To The Issues Of Law To Be Determined

1. Plaintiff contends that Paul Cohn never became a partner, *inter se,* in the firm of HW&Co. because of:

(a) the failure of certain partners to sign and accept the proposed HW&Co. July 1, 1969 partnership agreement and make their capital contributions in accordance with the terms of said agreement which purported to admit Cohn as a partner;

(b) the failure of HW&Co. to obtain the written consent or ratification of all of the limited partners on the alleged admission of Cohn to the firm of HW&Co. and

(c) the failure of HW&Co. to obtain the required approval of the loan agreement between Cohn and Peerless by the New York Stock Exchange which approval would have permitted the proceeds of the loan to be considered a capital contribution to a member firm.

2. Plaintiff contends that AT&T's transfer of 2000 shares of AT&T common stock from Peerless to HW&Co. in violation of the "stop transfer" renders it liable to Peerless for the return of said stock or its equivalent plus the dividends which are due to Peerless.

Defendant's and Third-Party Defendants' Contentions As To Issues Of Law To Be Determined

1. Defendant AT&T contends that its transfer of 2,000 shares of AT&T common stock from Peerless to HW&Co. on September 17, 1970 was not wrongful; was not in violation of a valid "stop transfer"; and did not injure Peerless.

2. Defendant AT&T contends that, in the event it is required to pay damages or costs to Peerless, it is entitled to recover from HW&Co. the full amount of such damages or costs. In addition, defendant AT&T contends that it is entitled to recover from HW&Co. the full amount of the costs and expenses AT&T has incurred in the defense of this action.

3. Third-party defendants HW&Co., Irving E. Hertz and Henry Warner contend that any statements or representations made or claimed to have been made by Paul

Cohn to plaintiff or any principal thereof are not binding upon them.

4. Third-party defendants HW&Co., Irving E. Hertz and Henry Warner contend that after plaintiff provided Paul Cohn with the 2,000 shares of AT&T stock Peerless had no further ownership or interest therein.

5. Third-party defendants HW&Co., Irving E. Hertz and Henry Warner contend that neither Paul Cohn nor anyone acting on his behalf had any right to transfer or attempt to transfer the AT&T stock registered in the name of HW&Co. either to plaintiff or anyone else and their acts in regard thereto were highly improper.

6. Third-party defendants HW&Co., Irving E. Hertz and Henry Warner contend that Paul Cohn became a partner in HW&Co. at the time he executed the July 1969 Partnership Agreement and his rights and liabilities are governed thereby.

Plaintiff's Contentions As To
Issues Of Fact To Be Tried

1. Plaintiff contends that during the course of discussions and prior to the time Cohn signed the proposed HW&Co. July 1, 1969 partnership agreement, third-party defendants HW&Co., Hertz and Warner failed to disclose to Cohn that HW&Co. was suffering financial losses which would substantially reduce the firm's earnings from the 2.5 million dollars earned in the fiscal year July 1, 1967 to June 30, 1968.

2. Plaintiff contends that during the course of their discussions and prior to the time Cohn signed the proposed

HW&Co. July 1, 1969 partnership agreement, third-party defendants HW&Co., Hertz and Warner failed to disclose to Cohn that certain partners would not sign and accept the proposed HW&Co. July 1, 1969 partnership agreement.

3. Plaintiff contends that during the course of their discussions and prior to the time Cohn signed the proposed July 1, 1969 HW&Co. partnership agreement, third-party defendants HW&Co., Hertz and Warner failed to disclose to Cohn that certain of the partners would not make their capital contributions to HW&Co. in accordance with the terms of the proposed July 1, 1969 partnership agreement.

Third-Party Defendants' Contentions
As To Issues Of Fact To Be Tried

1. Third-party defendants HW&Co., Irving E. Hertz and Henry Warner contend that Paul Cohn, at all times relevant, was aware or could have been aware of the financial condition of HW&Co.

2. Third-party defendants HW&Co., Irving E. Hertz and Henry Warner contend that the July 1, 1969 Partnership Agreement became effective, as to each signing party thereto, when the Agreement was signed by each, and its validity was not subject to any condition precedent that it be executed by all of the parties thereto.

Exhibits

The following is a list of exhibits which plaintiff may introduce at trial. Plaintiff reserves the right to introduce such further documents as may become necessary for impeachment purposes.

1. American Telephone & Telegraph Company stock certificate No. 0471-0429 for 2000 shares of AT&T common stock registered in the name of Peerless Mills, Inc. (Pltf. Exh. 2 id.)

2. AT&T Form S-1280 (Pltf. Exh. 3A, 3B and 3C id.)

3. Undated letter from A. C. Fine to AT&T with envelope attached bearing postmark July 7, 1970 (Pltf. Exh. 4 id.)

4. Letter from S. J. Williams to A. C. Fine, dated July 29, 1970 (Pltf. Exh. 5 id.)

5. Letter from Joel Held to AT&T, dated September 15, 1970 (Pltf. Exh. 6 id.)

6. Letter on the letterhead of HW&Co., dated September 17, 1970 (Pltf. Exh. 7 id.)

7. Three documents marked as Pltf. Exh. 8A, 8B and 8C id.

8. Document on the letterhead of AT&T bearing the number 2322, dated 9/15/70 and signed by C. Cleary (Pltf. Exh. 9 id.)

9. Letter from A. C. Fine to AT&T, dated November 11, 1970 (Pltf. Exh. 10 id.)

10. Sixteen page document bearing the number Form S-1280 (Pltf. Exh. 11 id.)

11. Letter from AT&T to A. C. Fine, dated December 17, 1970 (Plft. Exh. 12 id.)

12. Letter from AT&T to Robert Sadlier, dated December 22, 1970 (Pltf. Exh. 13 id.)

13. Letter from AT&T to Lipkin, Gusrae & Held, dated October 27, 1970 (Pltf. Exh. 14 id.)

14. Four stapled sheets of paper bearing the number S-1280 (Pltf. Exh. 15 id.)

15. Letter from Joel Held to AT&T, dated September 15, 1970 (Pltf. Exh. 17 id.)

16. Document bearing the symbol AT&T and the signature of C. Cleary, dated September 15, 1970 (Pltf. Exh. 18 id.)

17. Letter from Joel Held to Mrs. Cleary, dated September 24, 1970 (Pltf. Exh. 19 id.)

18. AT&T Form S-1280 bearing the name Peerless Mills and the date September 18 (Pltf. Exh. 20 id.)

19. Letter from Joel Held to AT&T dated December 30, 1970 (Pltf. Exh. 21 id.)

20. Letter from AT&T to R. Sadlier, dated January 12, 1971 (Pltf. Exh. 22 id.)

21. Letter from AT&T to A. C. Fine, dated December 22, 1970 (Pltf. Exh. 23 id.)

22. AT&T Stock and Bond Instructions and Basic Transfer Requirements (Pltf. Exhs. 26, 27, 28 and 29 id.)

23. AT&T stock certificate No. 64X078137 representing 1000 shares of AT&T common (Pltf. Exh. 30 id.)

24. AT&T stock certificate No. 64XF0 78138 representing 1000 shares of AT&T common (Pltf. Exh. 30 id.)

25. Assignment of 2000 shares of AT&T common from Peerless Mills to HW&Co. and corporate resolution in support thereof (Pltf. Exh. 30 id.)

26. Document which purports to be the amended articles of limited partnership of HW&Co., dated July 1, 1969 (Pltf. Exh. 31 id.)

27. Monthly financial statement of HW&Co. as of December 31, 1968 (Pltf. Exh. 31A id.)

28. Monthly financial statement of HW&Co. as of January 31, 1969 (Pltf. Exh. 32 id.)

29. Financial statement of HW&Co. as of March 31, 1969 (Pltf. Exh. 33 id.)

30. Letter to Marvin Furst from Joel Held, dated October 8, 1970 with attachments (Pltf. Exh. 34 id.)

31. HW&Co. answers to financial questionnaire, dated November 2, 1969 (Pltf. Exh. 35 id.)

32. HW&Co. financial statement as of June 30, 1968 (Pltf. Exh. 36 id.)

33. HW&Co. partnership tax return form 1065 for the years 1968 (Pltf. Exh. 37 id.), 1969, 1970 and 1971.

34. Letter from Arthur Meyer to Joel Held, dated July 6, 1970 (Pltf. Exh. 39 id.)

35. HW&Co. statement of financial condition as of June 30, 1969 (Pltf. Exh. 40 id.)

36. Letter from NYSE Department of Member Firms to HW&Co., dated May 1, 1970 (Pltf. Exh. 41 id.)

37. Letter from NYSE Department of Member Firms to HW&Co., dated May 11, 1970 (Pltf. Exh. 42 id.)

38. Memorandum on the proposed July 1, 1969 HW&Co. partnership agreement (Pltf. Exh. 45 id.)

39. Letter from Arthur Meyer to Irving Hertz, dated March 20, 1970 (Pltf. Exh. 46 id.)

40. Letter from Sydelle Meyer to Irving Hertz, dated March 25, 1970 (Pltf. Exh. 47 id.)

41. Letter from Philip Fisher to Irving Hertz, dated March 25, 1970 (Pltf. Exh. 48 id.)

42. Letter from Diana Fisher tc Irving Hertz, dated March 25, 1970 (Pltf. Exh. 49 id.)

43. Letter from Irving Hertz to M & B Company, dated May 3, 1971 (Pltf. Exh. 50 id.)

44. Document entitled Hertz, Warner & Co. Statement of Financial Condition—February 28, 1970

45. Document entitled Hertz, Warner & Co. Statement of Financial Condition as of March 29, 1970

46. Document entitled Hertz, Warner & Co.—November 30, 1972—Balance Sheet—Realizable & Recognized

47. Agreement for the sale of assets, dated Aprii 30, 1970

48. Agreement between Hertz, Warner Affiliated Corp. and Joseph Blau and Arthur Meyer, dated April 30, 1971

49. Bill of sale and assignment, dated May 3, 1971

50. Assumption agreement, dated May 3, 1971

51. HW&Co. Articles of Limited Partnership, dated July 1, 1968

52. Records of Henry Warner's trading and capital accounts

53. Records of Irving Hertz's trading and capital accounts

54. Records of Marilyn Hertz's and Ina Warner's trading accounts

The following is a list of exhibits which defendant and third-party defendants may introduce at trial. Defendant and third-party defendants reserve the right to introduce such further documents as may become necessary for impeachment purposes.

Defendant AT&T and third-party defendants may introduce those exhibits listed by plaintiff and numbered 1

through 25. In addition, defendant may introduce the following:

1. Assignment form reflecting transfer of certificate numbered 0492-8835 from HW&Co. to Dreyfoos & Co.

2. AT&T stock certificate numbered 0492-8835 for two thousand shares of AT&T common stock registered in the name of HW&Co.

3. AT&T stock certificates numbered 073451 and 073452, each for one thousand shares of AT&T common stock and each registered in the name of Dreyfoos & Co.

Witnesses

Plaintiff intends to call the following witnesses and any other witness as may become necessary for impeachment purposes:

M. Fine
J. T. Mapletoft
J. L. Clundt
S. J. Williams
P. Cohn
J. Held
D. Warner
C. Matthews
H. Kalman
B. Schiff
A. Meyer
J. Blau
I. Hertz
M. Warner
M. Furst

Defendant and third-party defendants intend to call the following witnesses and other witnesses as may become necessary for impeachment purposes:

Defendant AT&T may call any or all of those witnesses listed above by plaintiff.

Defendants HW&Co., Irving E. Hertz and Henry Warner, may call any or all of those witnesses listed above by plaintiff.

Amendment of Pleadings

Plaintiff does not contemplate any formal amendments to the pleadings.

Stipulations

The parties will not object to the authenticity of the documents listed under "Exhibits" in this order, except that plaintiff objects to the authenticity of a copy of any document which purports to be the amended Articles of Limited Partnership of HW&Co., dated July 1, 1969. Copies of such documents may be used for all purposes.

Dated: February , 1974

So Ordered.

MARVIN E. FRANKEL
United States District Judge

Pretrial Order

Consented To:

April 1, 1974

KISSAM & HALPIN, Esqs.
By ANTHONY S. GENOVESE
A Member of the Firm
Attorneys for Plaintiff Peerless Mills, Inc.
120 Broadway
New York, New York 10005

DAVIS, POLK & WARDWELL, Esqs.
By S. HAZARD GILLESPIE
A Member of the Firm
Attorneys for Defendant
American Telephone and Telegraph Company
One Chase Manhattan Plaza
New York, New York 10005

DICKSTEIN, SHAPIRO & MORIN, Esqs.
By s/ ARTHUR J. GALLIGAN
A Member of the Firm
Attorneys for Third-Party Defendants
Hertz, Warner & Co., Irving Hertz and
Henry Warner
745 Fifth Avenue
New York, New York 10022

LEA, GOLDBERG, GOLDSMITH, & SPELLUN, Esqs.
By LOLA S. LEA
A Member of the Firm
Attorneys for Third-Party Defendant Paul Cohn
120 Broadway
New York, New York 10005

LIPKIN, GUSRAE & HELD, Esqs.
By LIPKIN, GUSRAE & HELD, by LAWRENCE E. HELD
A Member of the Firm
Attorneys for Third-Party Defendant Joel Held
225 Broadway
New York, New York 10007

Findings of Fact and Conclusions of Law of United States District Judge Marvin E. Frankel

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civ. 910

PEERLESS MILLS, INC.

Plaintiff,

against

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Defendant and Third-Party Plaintiff,

against

HERTZ, WARNER & Co., a partnership, et al.,

Third-Party Defendants.

FRANKEL, *D.J.*

Beneath its complexities and stock-transfer technicalities and oddly indirect claims of fraud, this lawsuit concerns a loss of $100,000 by generous parents who made no special inquiry and relied upon no special representations when they loaned stock of that value to launch their daughter's young husband on what all hoped would be a speedy road to wealth in Wall Street. Like his wife's parents, the young man omitted to explore or consider with any care facts about the business venture which were known or knowable to him. Indeed, it is a striking fact in the case that he does not himself claim to have been de-

ceived, and is not a plaintiff, but appears only as a witness for his in-laws. Upon facts and conclusions hereinafter outlined, the claim to transfer the indirect loss to others must be rejected.

I.

Paul Cohn, at the age of 23, became a founding partner of a securities brokerage firm, Hertz, Newmark & Warner, predecessor of the third-party defendant partnership, Hertz, Warner & Co., a limited partnership under the laws of New York State. Energetic and ambitious, Cohn withdrew from the firm two years later, dissatisfied with the scope of his responsibilities and his exclusion from policy decisions. He stayed on, however, as an employee, working as a registered representative. In the course of time he became increasingly active in syndications, eventually forming and running the firm's syndication department under the direct authority of defendant Henry Warner.

In 1968, Cohn married Leslie Fine, whose father was A. C. Fine, president and sole shareholder of plaintiff Peerless Mills, Inc., a family holding company of some apparent substance. 1968 was also a brilliant year (the best ever) in the career of Hertz, Warner & Co. It was a time a court in this City may notice as one of euphoria for securities dealers, but soon to end in widespread sorrow. Newly married and generally flourishing, Cohn was earning some $33,000 per year by the fall of 1968. In the early spring of 1969, he broached with Henry Warner the idea of becoming a general partner again. The idea was approved by the executive committee of the firm and led to the implementing arrangements and losses giving rise ultimately to this lawsuit.

Findings of Fact and Conclusions of Law of United States District Judge Marvin E. Frankel

From all th[illegible] including notably Cohn's own testimony, it is [illegible].e was at no time interested in, or attentive to, the [illegible]s of the firm's finances and current operations. He knew that 1968 was a busy year in Wall Street. He knew his own activities were profitable. He neglected to look at monthly financial statements of the firm. He was inattentive over the years to the degree of the firm's profitability. He made no inquiries about current profit-and-loss figures in the early months of 1969, when his proposed reenrollment as a partner was being discussed. Had he desired such information, it would have been given to him.

Cohn did know that the first six months of the firm's fiscal year beginning July 1, 1968, were profitable, with earnings totalling around $1,000,000. He did not know that the early months of 1969 were showing substantial losses, so that the second half of the fiscal year came eventually to wipe out the earnings of the first. The causes of the losses were not fully appreciated by those in charge of the firm's affairs. More importantly, they had no appreciation of the impending disaster that was soon to destroy the partnership as a going concern. A change in New York Stock Exchange practices, outlawing "give-ups" (customer directed arrangements for splitting brokerage commissions) by large investors (mainly mutual funds), wiped out a major source of the firm's profits at the end of 1968. Other changes in the industry were causing sharp revisions in the structure of the business at the same time. In January of 1969, well before discussion of Cohn's partnership desires, it was decided that the firm would close its branch offices and consolidate into a single office. This was known at the time to Cohn. Other profound revisions in the structure and character of the business were taking place

in the same period and were likewise known to Cohn. New kinds of brokerage business were attempted and new forms of expertise were cultivated.

In short, the spring of 1969, when Cohn's reenrollment as a partner was being arranged, was a time of transition and uncertainty for the firm. It was not possible to know whether the current losses were transitional phenomena, as those in charge seemed to think, or portents of worse developments still to unfold. Nobody knew of the rocky times ahead in Wall Street, matters now visible as history. Hertz, Warner signed a new three-year lease on office space in March of 1970, reflecting expectations of all concerned quite different from the total collapse short months later.

In addition to the losses being incurred in early 1969, the firm was returning substantial amounts of limited and subordinated capital. A significant group of limited partners, the "Meyer-Blau group," was to make a capital contribution of $1,857,000 for the fiscal year beginning July 1, 1969, but, as things turned out, this group did not sign the partnership agreement. The status of the Meyer-Blau group continued as a matter of negotiation and uncertainty over a period of many months extending far beyond Cohn's signing of the partnership agreement in November or December 1969. It was not made clear until the spring of 1970 that this group would not renew its participation in the firm for the year beginning July 1, 1969, and would have its obligations measured by the agreement of a year before. In the end, this group lost all of its capital, contributed under the 1968 agreement, in the firm's liquidation.

Defendant Hertz painted an optimistic picture of the firm's future in discussing with Cohn the idea of the latter's resumption of partnership status. Hertz entertained

this essentially hopeful view himself. He stressed the high earnings of the last six months of 1968. He did not mention the losses of the early months of 1969, though these were known to Hertz (and to Warner as well) before Cohn signed on as a partner. Nor did he stress the problems of transition and readjustment which were visible to Cohn and other knowledgeable people in the enterprise. Neither Hertz nor Warner intended, however, to mislead Cohn in any material respect. They were entitled in all the circumstances to assume that Cohn could observe the problems apparent to everyone. They stood ready to give him whatever information he desired. The cause of any ignorance he may have experienced was his essential indifference to the subjects now claimed by plaintiff to have been affected by material omissions or affirmative misrepresentations.

The court finds, in sum, that there were no fraudulent statements or omissions to Cohn by any member of the firm. Whether or not it reflects a similar view, Cohn's failure ever to assert any such claim on his own behalf (he having been a third-party defendant, not a plaintiff, in this action) is a circumstance of some passing interest.

What is still clearer, and more clearly decisive, is that the plaintiff herein—formally a corporation, practically Cohn's in-laws—has no basis for its claim of fraud against the partnership or any member thereof.

As a condition of becoming a partner, Cohn was called upon to make a capital contribution of $100,000. Hertz and Warner were aware that Cohn would probably be borrowing for this purpose from his in-laws. In October of 1969, Cohn obtained from plaintiff Peerless a loan of 2,000 shares of the stock of defendant American Telephone and Telegraph Company. In connection with the loan,

plaintiff executed a standard form of securities loan agreement, reading in part as follows:

> "Peerless Mills, Inc. does not reserve or retain any property right in the cash and stock loaned but their rights hereunder shall consist solely of the contractual right against Paul Cohn individually to the repayment of said loan in the manner hereinabove specified; and the Firm shall not be under any liability to Peerless Mills, Inc. by reason of this agreement nor shall it be under any obligation whatsoever to Peerless Mills, Inc. on account of said cash and stock or any interest thereon, stock dividends or rights received by Paul Cohn or the Firm."

Quite apart from that sweeping waiver, there was no deception of the Fines or of plaintiff, direct or indirect, by any member of Hertz, Warner. In a general atmosphere of trust and affection, the Fines asked Cohn little or nothing about the firm or his projected status as a partner. He expressed generally rosy hopes. They were pleased for him over his seeming rise in the securities industry. They neither sought nor received any concrete information about the state of the partnership or its prospects.

On November 19, 1969, the 2,000 shares of AT&T stock delivered by Peerless were registered in the name of Hertz, Warner.[1] While the partnership year ran from July 1, Cohn did not actually sign the partnership agreement until

---

[1] For some months after this, dividends on these shares were credited to Cohn's capital account in the firm. He testified that he in turn paid the dividends over to plaintiff. But this is a fact of no consequence. Cohn's receipt of the dividends was in accordance with the partnership agreement. What he did with them cannot affect the rights or duties of the parties in this case.

late November or early December of 1969. The agreement, which had gone through a series of drafts, was effective, however, as of July 1, 1969. In this respect, as in others, the hectic state of the firm's affairs was less than completely orderly, precise, or technically perfect. Nevertheless, at the time of signing, as well as before and after, Cohn intended to be a partner and had no reservations or conditions upon the assumption of this status.

Not long after Cohn's signing, however, the deteriorating condition of the partnership became a setting for discord and recriminations which were to attend the short remaining life of the business. The statement for the fiscal year ended June 30, 1969, was published in late December, disclosing that the $1,000,000 of earnings for the first six months had been substantially wiped out by the losses of the last six. Cohn and others of the younger partners demanded a greater voice in the partnership affairs, meeting varying success in the effort. Large losses after July 1, 1969, added to the upset and dissension. Shortages in the capital accounts of some partners were disclosed and became added sources of concern and disaffection.

In February 1970, Cohn and another new partner, Joel Held, consulted counsel and explored the possibility of claiming that they had been fraudulently induced to join the firm. In addition, Cohn discussed with another partner, Robert Sadlier, apparently friendly to him, ways of protecting or salvaging his interest, with particular reference to the 2,000 shares of AT&T stock. On May 1, 1970, Sadlier caused the transfer of 20 100-share certificates of AT&T stock held in Hertz, Warner's name into a 2000-share certificate in the name of Peerless. The 20 certificates handled in this fashion were not related in any way to the different certificates Peerless had loaned to Cohn for

transfer to Hertz, Warner. No member of the partnership had authorized or purported to authorize the surreptitious transfer thus effected by Sadlier for and with Cohn. The new certificate, in plaintiff's name, was retained physically in the Hertz, Warner offices, evidently on some notion that this might make the lawless transfer something less than a conversion or embezzlement.

After consulting with new counsel, Cohn caused Peerless to take the steps leading to AT&T's role here as defendant. On July 6, 1970, Peerless advised AT&T that it wanted a "stop transfer" order placed on the 2000-share certificate (No. 0471-0421) now held in its name through the action of Sadlier. The order was recorded on the books of AT&T the same day.

In the following month, having learned of the transfer to Peerless, Hertz demanded that Cohn arrange for the transfer of these shares back to the firm. Cohn refused. He was suspended from the firm not long thereafter.[2]

On September 15, 1970, Hertz, Warner presented certificate No. 0471-0429 to AT&T with a request for a transfer to its own name from the name of Peerless. Certifying that Peerless had no interest in these securities, Hertz, Warner agreed to indemnify AT&T and hold it harmless for any damages incurred because of the transfer. AT&T made the transfer two days later by cancelling certificate No. 0471-0429 and issuing to Hertz, Warner a new certificate, No. 0492-8835. Peerless was not informed promptly of this action. Upon learning of it, Peerless proceeded to inquire and complain. On November 11, 1970, it wrote to AT&T to "demand a detailed explanation of this unauthorized transfer." On December 17, 1970, a "Corres-

[2] Cohn's quarrels with the partnership are the subject of a pending arbitration.

pondent'' for AT&T wrote to Mr. Fine, as President of Peerless, reporting that AT&T's legal department had made ''a preliminary review of the case, and . . . [had] said that a mistake was made in processing this transfer.''

Despite this ''preliminary'' view, AT&T came later to conclude that Peerless had not been the rightful owner of the shares in question and that no right of Peerless against AT&T had been violated. This action followed. The sole defendant named in the complaint was AT&T, from which plaintiff sought a new 2000-share certificate and accrued dividends, plus interest thereon. AT&T in turn impleaded Hertz, Warner & Co. and its general partners, including Cohn. In an amended complaint, Peerless asserted claims against Hertz, Warner & Co., Irving Hertz, and Henry Warner. The amended complaint averred that on various grounds Cohn never effectively became a member of the partnership, and that the Peerless shares loaned for Cohn's capital contribution had therefore been ''wrongfully converted, retained and sold by'' the partnership and individual defendants Hertz and Warner. In addition, Peerless charged that these defendants had made false representations to Cohn and, through Cohn, to Peerless; that Cohn signed the agreement only upon the representation that the listed general and limited partners would sign and would make their indicated capital contributions, though ''Hertz and Warner knew or had reason to know that at least seven of the proposed partners would not sign . . . and would not make their required capital contributions''; that Peerless would not have loaned the stock to Cohn but for these false representations; that for these and other reasons ''the securities loan agreement between Peerless and Cohn became null and void''; and that the Hertz, Warner defendants had thus become converters of

the AT&T shares in question. As the case has progressed the charges against these defendants have become the heart of the controversy.

II.

As its first and basic contention plaintiff argues that "Cohn never became a partner of [Hertz, Warner] as a matter of law." Accordingly, the argument proceeds, the Peerless shares delivered as Cohn's capital contribution, for a partnership that never came into being, were converted by the firm and by defendants Hertz and Warner individually. The grounds for the critical assertion that Cohn never became a partner are:

> (1) That "at least nineteen intended partners did not sign" the July 1, 1969, agreement, including an important group who were to contribute $2,000,000 in capital and assume 18% of the losses.
>
> (2) Hertz, Warner failed to file the agreement with the New York Stock Exchange.
>
> (3) The agreement was never filed in the New York County Clerk's Office.
>
> (4) The limited partners did not all give written consent to Cohn's admission as a general partner.

These contentions fail because Cohn intended to become a partner, agreed with the others to become their partner, and succeeded in accomplishing that end, without any of the supposed reservations and conditions upon which plaintiff's thesis is rested. There was a huge number of limited partners and a substantial number of general partners listed on the typed agreement. Nearly all of the general

partners signed. The failure of 19 or so limited partners to sign did not nullify the agreement. It was familiar in the firm that the roster of limited partners changed from month to month as some left and others were added. It was never a condition of effectiveness that all should sign. That the Meyer-Blau group would sign was a hope Cohn shared with all of the other third-party defendants, including Messrs. Hertz and Warner. That the group did not sign was an adverse development for all of them. But it was not fatal to the existence of the partnership. Their signing the 1969 document was not a condition to the effectiveness of the partnership or to Cohn's membership. (It is interesting, if not critical, that, having signed previous articles, including those of July 1, 1968, the Meyer-Blau group lost sums far larger than Cohn's—or plaintiff's—$100,000 in the eventual Hertz, Warner debacle.) That they would surely sign was not "represented" to Cohn or insisted upon by him as an essential preliminary to his membership. Whether the Meyer-Blau group would be in or out was, as Cohn testified, "not a question in [his] mind" when he made his capital contribution, having effectively been a partner for some five or six months before.

The failure to file the partnership agreement with the Stock Exchange or in the County Clerk's Office is of no help to plaintiff. Whatever rights or privileges they might give to third parties, there is no basis in these defects for invalidating the partnership as between Cohn and the other signatories. And Peerless is obviously in no better position than Cohn to claim such invalidation.

Finally, the point about consent of the limited partners seems weightless. The evidence shows a large and shifting complement of limited partners. Whatever *they* might

claim from the absence of their assent is of no aid to Cohn—or, certainly, to Peerless.[3]

With the elimination of plaintiff's basic premise—that Cohn, after agreeing and signing and functioning as a partner for most of a year, should be held never to have joined the partnership—the theory that Hertz, Warner or its members "converted" the AT&T stock must also be rejected. This, as will appear, leaves relatively little to say for the remainder of plaintiff's case.

III.

The findings and conclusions already stated are dispositive of plaintiff's next point—that Peerless loaned its stock to Cohn as a result of fraud against *Peerless* on the part of Hertz, Warner and Messrs. Hertz and Warner individually. First of all, there were no material misrepresentations to Cohn. Secondly, plaintiff's theory, grounded in § 533 of the *Restatement of Torts*, is factually unsupported in any event. The representations made to Cohn were not made, in the language of that section, "for the purpose of having him repeat [their] terms or . . . substance" to his in-laws. And he did not, in fact, do anything of the sort, merely expressing his satisfaction

[3] The third-party defendants attack plaintiff's standing to question the partnership at all. More broadly, the claims of Peerless may be altogether precluded by the form of "Securities Loan Agreement," quoted earlier, in which Peerless absolved Hertz, Warner of "any liability to Peerless" and agreed, further, that Hertz, Warner should not "be under any obligation whatsoever to Peerless . . . on account of said cash and stock or any interest thereon, stock dividends or rights received by Paul Cohn or the Firm." These are powerful points—at least in the absence of fraud. At the same time, since the court rejects plaintiff's fraud claims, it is unnecessary to rest upon the loan agreement for dismissal of the complaint.

and hopes for the impending partnership. The testimony for Peerless, from Mrs. Fine, showed only the vaguest account from Cohn to her and her husband of the proposed partnership. "Nothing" that the witness could "remember or think of" was said about other details or any "representations" made to him. There was no talk of "details about the business"—only that it was "a brokerage business, very promising, very lucrative." Even that was what the Fines themselves "thought" rather than something they heard from Cohn "in specific words." The Fines asked him no questions. As Mrs. Fine testified:

> "We took his word or whatever he felt—If he felt that it would promote or better his situation, we were very—we were pleased to do it."[4]

In short, the court rejects the factual contention that representations were made, or intended to be made, to plaintiff Peerless through Cohn or otherwise.

IV.

We come finally to plaintiff's claim against AT&T, which was the only claim in the case when the action started. This claim is rested upon the assertion that AT&T committed a "deliberate breach of its statutory duty of inquiry after receipt of the 'stop transfer' from Peerless."[5]

---

[4] Apart from familial affection, geography may have accounted for the notable brevity and superficiality of the conversations between Cohn and the Fines about the capital contribution. The Fines were in Florida while Cohn was in New York at the pertinent times.

[5] Plaintiff's Post Trial Brief 59.

Intertwined with, and seemingly essential to, this argument are the contentions that

> (1) "since Cohn never became a partner of HW&Co. as a matter of law, the purpose for which the AT&T securities were delivered from Peerless to HW&Co. was totally frustrated", and that this,
>
> (2) "when combined with the fraud practiced upon Peerless in connection with the transfer of the AT&T securities, makes it apparent that HW&Co. never acquired valid title to the securities."[6]

The defeat of the two quoted contentions, treated earlier, entails defeat of the claim against AT&T.

Moreover, as the record makes clear, the certificate in the name of Peerless, to which the "stop transfer" order related, had been placed in that name by an act of blatant lawlessness. There was no justification for this form of "self-help," which verged at least close to criminality. Far from being the "rightful owner" of the shares, as it styles itself,[7] Peerless had no semblance of a legitimate interest in them. Since the transfer back to Hertz, Warner was not "to a person not entitled to it", and since Peerless was not at any material time "the true owner" of the certificate or the shares it represented, see Uniform Commercial Code § 8-404, AT&T cannot be held for the loss of the Fines incurred from the loan to their son-in-law.

Upon the foregoing findings and conclusions, intended to comply with F.R.Civ.P. 52(a), plaintiff's complaint and additional complaint are dismissed, the third-party complaint is consequently also dismissed, and the counterclaim

---

[6] *Id.*

[7] *Id.* at 60.

of the third-party defendants Hertz, Warner, Irving Hertz, and Henry Warner, seemingly forgotten at some point, is also dismissed. The parties will bear their own costs.

The Clerk will enter judgment in accordance with these findings and conclusions.

/s/ MARVIN E. FRANKEL
U.S.D.J.

Dated: New York, New York
October 31, 1974

Filed October 31, 1974
United States District Court
Southern District of New York

Judgment Appealed From

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civil 910 (MEF)

[SAME TITLE]

The above entitled action having been brought on regularly for trial before the Honorable Marvin E. Frankel, United States District Judge, on May 14, 15 and 16, 1974, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on October 31, 1974, having handed down its opinion, constituting its findings of fact and conclusions of law in favor of the defendants and third-party defendants, it is,

ORDERED, ADJUDGED AND DECREED: That defendant American Telephone and Telegraph Company have judgment against the plaintiff Peerless Mills, Inc., dismissing the complaint and the additional complaint, and it is further,

ORDERED: That the third party complaint is dismissed, and the counterclaim of the third-party defendants Hertz, Warner, Irving Hertz and Henry Warner be and they are hereby dismissed, and the parties will bear their own costs.

Dated: New York, N. Y.
November 6, 1974

RAYMOND F. BURGHARDT
Clerk

Filed November 6, 1974
United States District Court
Southern District of New York

Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

71 Civ. 910 (MEF)

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that plaintiff Peerless Mills, Inc., hereby appeals to the United States Court of Appeals for the Second Circuit from so much of the judgment entered in this action on November 6, 1974 which dismissed the complaint and the additional complaint.

Dated: New York, New York
December 4, 1974.

Yours, etc.

KISSAM & HALPIN
By ANTHONY S. GENOVESE
A member of the Firm
Attorneys for Plaintiff
120 Broadway
New York, New York 10005
(212) 962-2000

To:

DAVIS, POLK & WARDWELL
Attorneys for Defendant
American Telephone & Telegraph Company
1 Chase Manhattan Plaza
New York, New York 10005

LIPKIN & WEISBERG
Attorneys for Third Party Defendants
Hertz, Warner & Co., Irving Hertz and Henry Warner
225 Broadway
New York, New York 10007

Excerpts of Trial Transcript

Paul Robert Cohn—By Mr. Genovese—Direct

* * *

(7) PAUL ROBERT COHN, called as a witness by the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Genovese:

Q. Mr. Cohn, would you give the court a brief description of your educational background? A. I attended elementary school and junior high school in Mt. Vernon, New York. I attended Horace Mann Preparatory School for high school. Upon graduation (8) from Horace Mann I attended the University of Miami in Florida for two years. Then I transferred and attended New York University uptown for approximately one semester.

Q. Now, would you give us a description of the plaintiff Peerless Mills in this action, please? A. Peerless Mills is a personal holding company.

Q. Who are the principal stockholders in Peerless Mills? A. Mr. Fine and Mrs. Fine.

* * *

(9) *By Mr. Genovese:*

Q. Mr. Cohn, after leaving NYU, what did you do? A. I entered the securities business.

Q. Can you tell me approximately when that was? A. Approximately 14 years ago.

Q. And you have been in the securities business for that period of time? A. Except for six months of unemployment, that is correct.

Q. Now, did there come a time when you joined the firm of Hertz, Neumark & Warner? A. Yes, sir.

Q. When was that, sir? A. In October, 1963.

Q. Can you tell me the circumstances under which you joined that firm, sir? A. I was solicited by some previous acquaintances of mine in the securities business about becoming a founding partner of the firm of Hertz, Neumark & Warner.

Q. And did you become a founding partner? A. Yes, I did.

Q. And what were your functions as a partner of (10) the firm of Hertz, Neumark & Warner? A. Commission business.

Q. When you say "commission business," what is that, sir? A. Similar functions to that of a registered broker.

Q. Did you continue as a partner in the firm of Hertz, Neumark & Warner? A. No, I did not. My partnership—I terminated my partnership approximately two years later.

Q. And did you have any conversations with anyone concerning that termination? A. Yes, I did.

Q. With whom, sir? A. Mr. Irving Hertz.

Q. Can you tell us what was said by him and what was said by you at that time? A. Based on the original solicitation of my becoming a partner of Hertz, Neumark & Warner I was to be a founding partner and as such involved in policy-making decisions of the firm. After joining the firm as a partner, in the ensuing two years none of that happened to develop. I was not called upon to be involved in any decision-making processes of the firm.

* * *

(11) The Court: Just answer the question, Mr. Cohn. What was that conversation?

(12) The Witness: I told Mr. Hertz that I was not happy with the fact that I was not involved,

as I thought I was to be involved, in the policy decisions of the firm, and as such I wanted to terminate my partnership.

By Mr. Genovese:

Q. Did you continue on as an employee of the firm of Hertz, Neumark & Warner? A. Yes, I did.

Q. Did there come a time, Mr. Cohn, when the firm name of Hertz, Neumark & Warner changed? A. Yes, it did.

Q. And to what did it change? A. Hertz, Warner & Company.

Q. Did you continue on as an employee in that firm, sir? A. Yes, I did.

Q. What were your responsibilities in Hertz, Warner & Company? A. I was a retail broker for the firm of Hertz, Warner & Company during that period of time.

Q. Did there come a time when your duties changed? A. Yes, there did.

Q. Will you say when that was, approximately? (13) A. Approximately 1968.

Q. Can you tell me what you did at that time, sir? A. I was approached by Mr. Richard Leyner of the firm and asked if I would help in setting up and functioning in the syndicate capacity of the firm of Hertz, Warner & Company.

Q. Did you perform that function? A. Yes.

Q. Did you continue to do any other duties at that time? A. I continued doing my general brokerage business, yes.

Q. Can you give us an estimate as to how much of your time was in the general brokerage area and how much of your time was in the syndication area? A. The bulk,

approximately 80 to 90 per cent of my time, was still on retail production.

Q. Did that change, sir? A. Yes, sir.

Q. When, approximately? A. Over the ensuing year, progressively I became more and more involved with the syndicate function I was performing for the firm.

Q. Now, could you tell us just briefly what the (14) syndicate function is? A. The syndicate function is that of a wholesaling function for a member firm. That is, a syndicate manager of a firm tries to involve his firm in new offerings initiated by major banking firms on Wall Street and in so doing takes down blocks of stock for the ultimate redistribution through our brokers to our retail customers.

Q. Now, was there anyone else functioning in the syndicate area of the firm? A. I had a secretary eventually but was not directly responsible for working with dealers.

Q. You were the sole decision-making person in that department, is that correct? A. No. Initially, Mr. Richard Layner was the one I was responsible to. That eventually changed. As my function became more and more involved in the syndicate and our participations broadened, my responsibility of reporting was then to Mr. Henry Warner.

Q. You reported directly to Mr. Warner? A. That is correct.

Q. What were Mr. Warner's functions in the syndicate area? A. Mr. Warner was the partner in charge of the syndicate department, amongst other duties.

(15) Q. Did there come a time, Mr. Cohn, when you had a discussion with Mr. Warner concerning your increased responsibilites in the syndicate area? A. Yes, sir.

Q. When was that approximately, sir? A. There were conversatioons that took place with Mr. Warner as the mix

of my endeavors—as I became more and more involved in the syndicate area and less and less involved in the retail production area, that I was seeking a higher compensation factor for the fact that I was now really not doing any retail business and I was losing income.

Q. Did you in fact receive additional compensation? A. The initial proposal by Mr. Leyner—

The Court: Just answer the question.

A. Yes.

Mr. Lipkin: Could we fix times on these conversations, your Honor?

The Court: All right.

Q. I asked you about a conversation with Mr. Warner. When was the first such conversation you had regarding your increased responsibilities in the syndicate area which you can recall? (16) A. The fall of '68.

Q. Did you have additional conversations with Mr. Warner on that subject? A. There were subsequent conversations, yes.

Q. Can you tell us when the next one was, approximately? A. Conversations occurred over intermittent periods separated by months perhaps.

Q. In any of these conversations was the subject of your possibly becoming a partner in the firm of Hertz, Warner & Company discussed? A. Yes.

Q. Can you place that in point of time, sir? A. March, April of 1969.

Q. What was your salary at that time, Mr. Cohn? A. Approximately $33,000.

Q. How, in the first such conversation in which the subject of partnership came up, could you tell the court what was said by you and what was said by Mr. Warner?

A. Mr. Warner told me that the senior partners of the firm were very much aware of the progress being made through my endeavors in our syndicate area. They were very pleased and that the topic of partnership for me was being discussed.

(17) Q. What did you say to him, if anything? A. I told him I was extremely pleased.

Q. Was anything else said in that conversation that you can recall? A. No, sir.

Q. Was there a subsequent conversation? A. Yes, sir.

Q. When was that in point of time, sir? A. Within weeks.

Q. Can you tell me what was said by you and what was said by Mr. Warner in the subsequent conversation? A. In the subsequent conversation a specific proposal was made to me about my becoming a partner in the firm of Hertz, Warner & Company.

Q. What did Mr. Warner propose? A. He proposed to me, I remember quite clearly, a nonnegotiable-type basis that they were offering me—

> Mr. Lipkin: I object to the characterization, "nonnegotiable." He was asked what Mr. Warner said. If he doesn't use those words, I object.

A. He used those words.

That the firm was offering me a 3 per cent partnership in the firm and a salary of $15,000 a year, and that I would participate in approximately 4½ per cent of the firm's losses.

(18) Q. What did you say to that, sir? A. I thanked him but told him that that remunerative figure posed tremendous problems to me; that I had recently gotten mar-

ried and that my responsibilities and my financial situation became greater, and the figure he was representing to me was a substantial decrease in earnings than I was currently making.

Q. What did he say to that, if anything? A. He began to explain to me why that figure was just a bare minimum as to what my earnings would be.

Q. When you say "that figure," are you referring to the $15,000 salary? A. $15,000.

Q. What did he say to illustrate that? A. He informed me that the firm of Hertz, Warner & Company had booked a million-dollar profit for the six months ending December —the preceding December—and if we were to use that figure as a point of reference, 3 per cent of a million dollars would be $30,000, in addition to which I would have a $15,000 salary.

In addition there was possibilities of bonuses based upon my performances in the syndicate area. Also, through the Hertz, Warner affiliated corporation additional profits could accrue to me.

(19) Q. Did you say anything in response to that? A. I told him that I would have to think about the proposition he made to me.

Q. And did you discuss this proposition he made to me.

Q. And did you discuss this proposition with anyone? A. Yes, I did.

Q. With whom? A. I discussed it with both my parents and my inlaws, Mr. and Mrs. Fine.

Q. Was the subject matter of your capital contribution discussed in this conversation with Mr. Warner? A. No, sir.

Q. Did you have a subsequent conversation with Mr. Warner on the subject of partnership? A. Yes, I did.

Q. When was that, approximately? A. Subsequently in the ensuing weeks I would imagine was the time frame.

Mr. Lipkin: Can we now place a time frame on that?

The Witness: We are still in the March-April area.

(20) Mr. Lipkin: We were in March-April and then you said several weeks later. Now you are saying weeks after that. So I really don't know. The time sequence is important, your Honor.

The Court: You are talking about a subsequent conversation?

The Witness: That is correct.

The Court: When was it?

The Witness: All conversations with—

The Court: No. just this subsequent conversation.

The Witness: The best I could pin it down would be in April.

The Court: You may cross examine about it later.

By Mr. Genovese:

Q. What was said in this conversation with Mr. Warner? A. Mr. Warner reiterated the previous conversation that my salary would be $15,000. I told him that I was still troubled, if he could go through the arithmetic again that he had explained to me in the preceding meeting, and again Mr. Warner explained to me that the firm had booked through December, the preceding December, a million-(21) dollar profit. He used that as an example of that period of time and what that would mean to me.

He also said that "You can annualize that figure and then see how the progression of earnings would directly be reflected in your income."

Q. Was anything else said? A. No, sir.

Q. Now, in this time period, which you have placed as March-April, the last conversation in April, did you have any discussions with Mr. Hertz regarding the subject of your partnership? A. Between the first conversation with Mr. Warner where the terms of my partnership were discussed and the second conversation with Mr. Warner, I spoke to Mr. Hertz.

Q. And can you tell the court what was said in that conversation? A. I went to Mr. Hertz and I told him that the formal proposal was made to me by Mr. Warner, that I was very pleased and I asked what he felt about it.

Q. What did he say to you? A. Mr. Hertz told me he was very happy for me and he thought this was the beginning of a very bright future for me in my association with the firm and thought that I (22) should accept the offer.

Q. Did you discuss it with any of your other associates at Hertz, Warner & Company? When I say "it," I mean the partnership offer. A. No, sir.

Q. Now, when was it that you learned it was necessary to make a capital contribution to the firm? A. The second meeting with Mr. Warner I accepted the terms of the proposed partnership he made to me, and at that time I was informed by Mr. Warner that my capital contribution would have to be $100,000.

Q. What did you say to that? A. I told him that I did not have that kind of money and I would have to borrow it.

Q. What did he say? A. Nothing.

Q. Did you advise him from whom you had to borrow it? A. I told him I would have to speak to both my parents and my in-laws.

Q. Did you have a further conversation with Mr. Warner regarding your capital contribution? A. Subsequent to that, yes, I did. I told him that I would be able to borrow the money.

(23) Mr. Lipkin: Again, can we fix a time? Did we fix a time for that conversation?

Q. You have testified that your last conversation was in April with Mr. Warner, is that correct? A. Yes, sir.

Q. Now, when you told him that you would have to borrow—when you told him you would have to borrow it, can you recall when that conversation was? A. That was the second conversation in April, when I was first told—the conversation in April is where I accepted the proposal and at which time Mr. Warner informed me of what my capital contribution would have to be. In a following conversation with Mr. Warner, I believe in April, I informed him that I would be able to borrow moneys to make my capital contribution.

Q. Did you tell him from whom you would be able to borrow it? A. Yes, I did.

Q. What did you say to him? A. I told him I would be making a borrowing from my in-laws.

Q. And did you tell him in what form that borrowing would be? A. I told him I would be borrowing securities.

(24) Q. And did you mention the name Peerless? A. I don't believe so at that time.

Q. Now, in any of these conversations with Mr. Warner to which you have just testified did you ask him what the current financial picture of Hertz, Warner was?

Mr. Lipkin: I object to the question as leading, your Honor.

The Court: No, I'll allow it.

A. In the conversations that I had with Mr. Warner—

The Court: Just answer yes or no.
The Witness: Yes.

Q. What was said? A. He told me that the firm had earned a million dollars for the period through December, that preceding December, 1968, and that there was no reason to believe why this could not continue.

Q. Were there any discussions with respect to the firm's earnings for the months January, February and March of 1969? A. No, sir.

Q. After your last conversation with Mr. Warner in which you advised him that you would be able to make the capital contribution, did you have any discussions (25) with any other people at the firm of Hertz, Warner regarding the subject of your proposed partnership? A. I spoke to Mr. Joel Held.

Q. Who is Mr. Held? A. Mr. Held was our compliance director.

Q. What did you say to him and what did he say to you on that subject?

* * *

(27) *By Mr. Genovese*:

Q. Now, Mr. Cohn, after your last conversation with Mr. Warner in which you accepted his proposal, did you receive a copy of a document entitled "Amended Articles of Partnership of Hertz, Warner & Co.," made as of the 1st day of July, 1969? A. Was this subsequent to my acceptance, did you say?

Q. Yes, sir. A. I show you what has been marked—

Mr. Lipkin: Can we fix a time, your Honor?
Mr. Genovese: I am going to get to that.
Mr. Lipkin: All right.

Q. I show you what has been marked Plaintiff's Exhibit 1 for identification and ask you whether that's the copy of the document that you received, sir. A. Yes, sir.

Q. Now, can you tell the court approximately when it was you received this document? A. Prior to December, 1969.

Mr. Lipkin: That's not an answer, your Honor, prior to.

Q. Can you place it any more specifically than that? It is dated July 1st—

(28) The Court: Don't tell him. Just ask him when you received it.

When did you receive it?

The Witness: Early December, very late November.

Mr. Genovese: I offer Plaintiff's Exhibit 1 for identification in evidence, your Honor.

(Plaintiff's Exhibit 1 for identification was received in evidence.)

Q. Mr. Cohn, going back to your last conversation with Mr. Warner again for a second, did you communicate the substance of your conversation with Mr. Warner to your in-laws, Mr. and Mrs. Fein? A. Yes, I did.

Q. Now, after receiving Plaintiff's Exhibit 1 in evidence what did you do, sir? A. I read the document, noting especially the capital contributions of various partners, the remuneration stated on there—noting especially the fact that Mr. Saluc, who was a member of the executive committee, put in the same amount of money I was as a junior partner, so to speak. I noticed also the extent of capital being contributed by Mr. Arthur Meyer and a Joseph Blau.

Q. Did there come a time, Mr. Cohn, when you (29) signed Plaintiff's Exhibit 1 in evidence? A. Yes, sir.

Q. Can you tell me the circumstances under which you signed it, sir? A. Mr. Joel Held brought the document to me in the premises of Hertz, Warner, the back office premises of Hertz, Warner, and asked me if I would sign the document.

Q. What did you say to him, if anything? A. I asked him at that point if Mr. Meyer and Mr. Blau had signed the agreement. He told me that Mr. Hertz informed him that the agreement was signed by them and was—

* * *

(30) *By Mr. Genovese*:

Q. Do you know where you left off? A. I believe so. Mr. Held informed me that he was informed by Mr. Hertz that Mr. Meyer and Mr. Blau had signed the agreement and it was at the affiliated corporation to be delivered down to him.

Q. Was that the full substance of your conversation with Mr. Held? A. I asked Mr. Held if he had signed—

> Mr. Lipkin: Can we fix a time, your Honor? No time for this meeting has been established as of yet.
>
> Mr. Genovese: I was going to do it as soon as I finished the conversation.

Q. Can you approximately place the time of this conversation, Mr. Cohn? A. Very late—either extremely late in November or probably right in the beginning of December, (31) '69.

Q. Would you go on with what it was that Mr. Held told you? A. I asked him if he had signed. He said yes. I signed and gave him back the agreement.

Q. Do you recall whether there were any other signatures on Plaintiff's Exhibit 1 in evidence at the time you signed it? A. I believe Charles Matthews' signature was on the agreement and a Milton Litt.

Q. Mr. Cohn, as of the time that you signed Plaintiff's Exhibit 1 in evidence, had you seen any monthly financial statements of Hertz, Warner & Company? A. No, sir.

Q. Were you aware that there were monthly financial statements in existence? A. No, sir.

Q. Did there come a time when you in fact delivered 2000 shares of AT&T stock in to the firm of Hertz, Warner & Company? A. Yes, sir.

Q. Can you tell me the circumstances of that, sir? A. Approximately October of 1969 Mr. Hertz came (32) to my office and told me that the firm had not yet received my Telephone stock and that would I expedite the matter.

Q. What did you say to him? A. I told him I would.

Q. What did you then do, sir? A. I called my in-laws in Florida and asked them if they would forward the proper securities and related material to me in New York as quickly as possible.

Q. And was that done? A. Yes, sir.

Q. Did you have any discussions with anyone else at Hertz, Warner regarding the contribution of the 2000 shares of AT&T stock? A. Yes, I did.

Q. With whom, sir? A. Mr. Joel Held.

Q What did you say to him and what was said to you in that regard? A. Mr. Held drew up a loan agreement for Peerless Mills and myself.

Q. I asked you what was said. Did he say anything? A. No, sir, not that I recall.

Q. After the AT&T stock was contributed to the (33) firm did you have any conversations with Mr. Hertz? A. I informed Mr. Hertz that the securities arrived and were delivered to Mr. Held.

Q. Mr. Cohn, did you come to learn of the firm's profits for the fiscal year 1968? A Yes, sir.

Q. Now, Hertz, Warner was on a fiscal-year basis, is that correct? A. Yes.

Q. What was the fiscal year? A. June 30th.

Q. And can you state when it was that you learned of the profit for the fiscal year ending June 30, 1969? A. Subsequent to my signing of the agreement.

Q. Can you place that in point of time? A. December, late.

Q. And do you recall what the financial results were for the year ending 1969? A. Yes, sir. Approximately $95,000?

Q. Profit? A. Yes, sir.

Q. After learning that fact did you discuss it with any of the partners at Hertz, Warner? (34) A. Yes, sir.

Q. With whom? A. With Mr. Charles Matthews and Mr. Joel Held.

Q. Do you recall what was said in that conversation, sir? A. We were all quite dismayed, and simple arithmetic in my mind—

The Court: Just answer the question, sir.

Q. I am looking for what was said, not your personal reaction. What was said in the conversation? A. The firm must have suffered losses to the extent of approximately a million dollars in the second half of the fiscal year.

* * *

(35) Q. Mr. Cohn, were there partnership meetings held in the firm of Hertz, Warner? A. What period of time are we talking about?

Q. In the period after your admission to partnership, what you believed to be your admission to the partnership. A. Yes, sir.

Q. When were the first meetings held, to your recollection? A. There were two different kinds of partnership meetings. There were weekly management meetings which I did not attend. There were, to the best of my recollection, possibly two or three full partnership social gatherings where managers, not partners, were also invited where general good and welfare was discussed. These were held off premises. Then there were two formal partnership meetings for all partners held in late December and into January. Late December, '69, January, '70.

(36) Q. Now, referring to the first such formal partnership meetings as you have just testified, can you relate to the court what was said by anyone at those meetings, sir? A. Mr. Hertz informed the general partnership that it looked like the firm from operations would suffer for the first six months of that year approximately an eight or nine hundred thousand dollar loss.

Q. Do you recall anything else being said? A. No, sir.

Q. Now, there was a second formal partnership meeting in that period, namely, December and January? A. The subsequent meeting was held, yes.

Paul Robert Cohn—By Mr. Genovese—Direct

Q. Do you recall what was said at that meeting?

* * *

(37) A. There were discussions about the return of an overage capital position of a Mr. David Warner; there were discussions about the possible—the underages of capital among some of the general partners. I called upon Mr. Hertz to require all general partners to come up to stated capital. Mr. Hertz' response was that they were not able to.

The discussion—the question was raised again at that meeting as to whether Meyer and Blau had signed the agreement. Mr. Hertz said that he is taking care of that, there is no problem.

I requested of Mr. Hertz, in front of the partners then and there, that as far as I was concerned I was the partner with the largest personal borrowing for capital and asked that my capital be subordinated (38) to the firm. My request was denied.

Q. You mentioned Mr. David Warner in regard to that meeting. When did Mr. David Warner purportedly become a partner? A. I believe December or November.

Q. Now, can you place the time of this meeting that you are talking about when, as you say, you requested that your capital be subordinated any more specifically?

Mr. Lipkin: He said became a partner in November or December. Does that mean he signed the agreement or that he was admitted into the partnership at that time? I think the answer is vague.

The Court: What do you mean by that?

The Witness: It was told to me that Mr. David Warner became a partner of the firm of Hertz, Warner & Company. He was not at the time that Mr.

Held and myself and Mr. Robert Sadlier, under this July, '69 agreement, were involved at all. He was a partner being brought in at some subsequent date.

The Court: Who told you that?

The Witness: Mr. Warner. It was announced at a general partners meeting off the premises of Hertz, Warner. He was an out-of-town partner. He was located in the Philadelphia area, on the Philadelphia-(39) Baltimore Stock Exchange.

Q. Did there come a time, Mr. Cohn, when the younger partners of Hertz, Warner held a meeting with the senior partners? A. Yes, sir.

Q. Can you place that point of time, sir? A. This was subsequent to the disclosures of the losses of the firm, subsequent to the meeting where capital underages were discussed. It would have put it at February-March of 1970.

Q. Who attended that meeting? A. Charles Matthews, myself, Joel Held, Robert Sadlier, and Mr. Irving Hertz.

Q. Can you tell the court what was discussed at that meeting, sir, what was said? A. The younger partners made certain requests of Mr. Hertz, namely, that they be permitted as a body to attend the management committee meetings of the firm. If that was not acceptable to Mr. Hertz, that one elected member of the younger group be allowed to participate in the management committee meetings with cumulative voting rights to represent the full body of the younger partners.

We asked that we get monthly profit and loss (40) statements of Mr. Hertz.

Again, the question of Mr. Meyer and Mr. Blau's signatures were raised and Mr. Hertz says that he is on top

of it. It's not to be a concern of ours. He will take care of it and it will be done.

Q. When you say the question of whether their signatures were raised, do you mean Plaintiff's Exhibit 1 in evidence, the July, 1969 agreement? A. Yes, sir.

Q. Did Mr. Hertz agree to give you monthly P & L's? A. Yes, sir.

Q. Did you in fact ever receive any? A. No, sir.

Q. After your second partnership meeting that you testified to and the meeting with Mr. Hertz and the younger partners, did you have any discussions with any of the other younger partners in Hertz, Warner? A. With Mr. Joel Held.

Q. Can you tell the court what was said by you and what was said by him? A. I told Mr. Held I was quite disturbed by the disclosures of losses, the lack of cooperation on the part of Mr. Hertz in not allowing either one of the younger partners or the group of younger partners to participate (41) in management committee meetings. I told him I felt possibly fraud was involved where I was concerned in my becoming a partner of Hertz, Warner & Company. Mr. Held suggested we see an attorney.

Q. What did you do, sir? A. Mr. Held and I saw the counsel. We want to Javits—the law firm of Javits & Javits.

Q. Who was it that arranged the meeting at the law firm of Javits & Javits? A. Mr. Held.

> Mr. Lipkin: Your Honor, we are going from one time to another. Can we now establish the time that he had the conversation with Joel Held and the time they went to Javits & Javits.

Paul Robert Cohn—By Mr. Genovese—Direct

Q. Can you tell us approximately when it was your conversation was with Mr. Held and how soon thereafter you went to Javits & Javits?

[A] [T]he latter part of February, 1970? [Q] Now, without going into the substance of your communications with the firm of Javits & Javits. After visiting Javits & Javits did you take any action, sir? A. Took no action with regards to Javits & Javits, but because of the fact that my time was being spent in the (42) back office of Hertz, Warner I began my own investigation of events at Hertz, Warner.

Q. You say you began your investigation of events. What did you do, sir? A. I checked capital accounts of various partners at Hertz, Warner and made several disclosures. I also became fully aware at that point of the lack of final signatures on the agreement that I signed that was presented to me by Joel Held. Mr. Sadlier, who was in the operations department at the time, showed me a copy of the agreement with—I don't know the legal terminology, but where it is indicated that people had signed and the copy was then conformed, and I saw the extent to which partners had not signed that agreement.

I noticed no capital contribution made by Mr. Robert Sadlier. I noticed substantial underages in the capital accounts, drawing accounts of Mr. Norman Carney, who was a member of the executive committee of the firm. I noticed substantial underages of capital in both Mr. Meyer's and Mr. Blau's capital accounts—

• • •

(43) A. I found the removal of capital from the capital account of Mr. Irving Hertz. That capital was covered by an agreement similar to the agreement under which I made my capital contribution and borrowed my capital, namely, 13,000 shares of Lyntex Corporation were re-

turned to Mrs. Marilyn Hertz from whom Mr. Hertz borrowed to make that capital contribution.

* * *

(44) *By Mr. Genovese*:

Q. Mr. Cohn, after making the review which you have testified to, did you have any conversations with anyone at Hertz, Warner.

The Witness: Your Honor, may I ask the court a question? I'm a little confused myself.

The Court: Just answer your attorney's questions.

A. Would you repeat the question.

(Question read.)

A Yes, sir.

Q. With whom? (45) A. Mr. Sadlier.

Q. What was said by you and what was said by him? A. I told Mr. Sadlier of that which I had discovered, told Mr. Sadlier I now believed that I was defrauded in becoming a partner of Hertz, Warner—

Mr. Weisberg: I object on the grounds of self-serving declarations.

The Court: Well, it's of no consequence. The fact that he said he believed he was defrauded is not going to be significant anyhow. Let's object where it is really important. There is no jury here.

Go ahead.

A. I told him I was quite concerned about my capital contribution. And Mr. Sadlier suggested to me that perhaps you should protect that capital contribution.

He further suggested that the stock be transferred back into the name of Peerless Mills to protect—

* * *

(47) *By Mr. Genovese:*

Q. Mr. Cohn, did you learn that the AT&T securities which were contributed by us as capital were transferred back into the name of Peerless Mills? A. Yes, sir.

Q. How did you learn that? A. I saw the securities coming back into the firm from the transfer agent.

Q. Did you yourself take any act in regard to the re-transfer of those securities, sir? A. No, sir.

* * *

(48) *By Mr. Genovese:*

Q. Mr. Cohn, after learning of the fact that the securities were transferring back into the name of Peerless, what did you do, if anything? A. I went to my attorney, Mr. Zane Klein, and informed him that the securities were now in the name of Peerless Mills.

Q. What firm was Mr. Klein with? A. Berlack, Israel & Lieberman.

(49) I further asked if, to further protect those securities, they should be removed, and he informed me they should not be removed from the firm.

Q. Now, thereafter did you attend a meeting with Messrs. Hertz and Sadlier? A. Yes, sir.

Q. Can you place this in point of time, sir? A. The very end of June or the beginning of July.

Q. And what was said at that meeting? A. Mr. Hertz informed both myself and Mr. Sadlier that all firm's securities, capital securities, should be liquidated.

Q. Was anything else said? A. No, sir.

Q. What did you do upon learning of that fact, if anything? A. I again sought advice of Mr. Klein. Subsequently a stop transfer was placed against the securities in question.

Q. I show you what has been premarked Plaintiff's Exhibit 2 for identification and ask you whether you had anything to do with the preparation of that letter, sir. (50) A. Yes, sir.

Mr. Genovese: For the record, Plaintiff's Exhibit 2 is a letter to Miss Clundt at American Telephone & Telegraph, signed by Peerless Mills, Inc.

Q. What did you have to do with this letter, Mr. Cohn. That letter was typed by my wife and transferred to her father for signature.

Mr. Genovese: Your Honor, I offer Plaintiff's Exhibit 2 in evidence.

Mr. Goldstone: No objection.

(Plaintiff's Exhibit 2 is received in evidence.)

Mr. Genovese: As a point of information, I have copies of all exhibits for the court. Should I hand them up or just hold on to them?

The Court: You can hold on to them. After we are all through if you have copies of all exhibits it may make sense for you to lodge them with the court.

Q. Mr. Cohn, going back in point of time for a minute, were you aware that Hertz, Warner received a letter dated May 1st from the New York Stock Exchange, Department of Member Firms? A. Yes, sir.

Q. I show you what has been marked Plaintiff's (51) Exhibit 3 for identification and ask you whether you

are aware as to whether Hertz, Warner received that letter? A. Yes, sir.

Mr. Genovese: I offer Plaintiff's Exhibit 3 in evidence.

Mr. Lipkin: No objection, your Honor, subject to connection.

(Plaintiff's Exhibit 3 for identification was received in evidence.)

By Mr. Genovese:

Q. Did Hertz, Warner receive a subsequent letter from the exchange dated May 11, 1970? A. Yes, sir.

Q. I show you what has been marked Plaintiff's Exhibit 4 for identification and ask you whether that is the letter that was received by Hertz, Warner from the New York Stock Exchange. A. Yes, sir.

Mr. Genovese: I offer Plaintiff's Exhibit 4 for identification into evidence.

Mr. Lipkin: No objection, your Honor, subject to connection.

(Plaintiff's Exhibit 4 for identification (52) was received in evidence.)

Q. Mr. Cohn, did you have any discussion with anyone at Hertz, Warner regarding whether the New York Stock Exchange considered your capital borrowing "good capital"? A. Yes, sir.

Q. With whom? A. Mr. Sadlier.

Q. Can you tell us what was said in that conversation, sir? A. Mr. Sadlier showed me both those documents I

have just seen and called my attention to that part which was relevant to my contribution to the firm.

• • •

(53) *By Mr. Genovese:*

Q. Do you recall when it was that Mr. Sadlier showed you these letters, one dated May 1, 1970, Plaintiff's Exhibit 3, and the other dated May 11, 1970, Plaintiff's Exhibit 4? A. When they were received, which would be as long as it took to be mailed from the stock exchange, since both of us were located in the back office of Hertz, Warner at that time, I would put it in May.

Q. Now, what were your functions in the back office of Hertz, Warner at that time, Mr. Cohn? A. Assisting Mr. Sadlier in the liquidation of the firm.

Q. That was in May, 1970, sir? A. It was the delivering off of customers' accounts and starting to wind down the affairs of Hertz, Warner, yes, sir.

Q. For how long did that continue, Mr. Cohn? A. As far as I was concerned, until October.

Q. And who was working in the offices of Hertz, Warner in the period May, June, through the summer into September and October? A. Other than clerical help, Mr. Sadlier and (54) myself. Mr. Hertz would periodically be coming by and visiting with us and spending time.

Q. Had Mr. Warner left the firm as of that time? When I say "as of that time," I am talking of the summer of 1970. A. I believe so, yes.

Q. Now, did there come a time, Mr. Cohn, when you had a discussion with Mr. Hertz concerning the 2000 shares of AT&T stock? A. Yes, sir.

Q. When was that, sir?

Mr. Goldstone: Your Honor, excuse me. Which stock are we talking about? Which securities are we talking about?

Mr. Genovese: I'll be more specific.

Q. Did there come a time, Mr. Cohn, when you had a conversation with Mr. Hertz regarding the 2000 shares of AT&T stock which had been retransferred back into the name of Peerless Mills? A. Yes, sir.

* * *

(56) Q. Did you have a conversation with Mr. Hertz regarding those shares? A. Yes, sir.

Q. Tell me what was said, please. A. Mr Hertz asked for the shares of American Telephone & Telegraph Company and they were given to him. He made a photostat, returned the shares and left the premises of Hertz, Warner.

Q. When was that, sir, approximately? A. August, mid to late August.

Q. Was there a subsequent conversation with Mr. (57) Hertz regarding the 2000 shares of AT&T stock? A. Several days later Mr. Hertz returned to the premises of Hertz, Warner and wanted to know how these securities were transferred, pointing out the recent date on the certificates. I told him I didn't know. He told me then to get the proper documentation to retransfer those securities out of Peerless back into the name of Hertz, Warner. I told him I would not.

Q. What did you do then, sir? A. That was the end of the conversation.

Q. Did you have a further conversation with Mr. Hertz on the subject? A. There was a conversation subsequent to the one I just described this September. Mr. Hertz came to the premises again of Hertz, Warner and told me

that I was being suspended from the firm due to the suspicious nature of the transfer. He asked me to remain until Joel Held arrived. I told him that he could not suspend me, that I would not wait for Mr. Held to arrive, and I left the premises of Hertz, Warner and went to my attorneys.

Q. Did you go back to the premises of Hertz, Warner? A. Yes, sir.

Q. When was that, approximately? (58) A. The following day.

Q. And did you continue to work at Hertz, Warner? A. Yes, sir.

Q. For how long, sir? A. Not too long. It was question of a week to 10 days. Mr. Hertz again returned to the premises of Hertz, Warner, informed me he no longer wanted me on the premises, that I was suspending pending an investigation as to the transfer of those securities, and that I would no longer be paid. At that point I left.

Q. Now, did there come a time, Mr. Cohn, when you learned that the 2000 shares of AT&T stock were registered in the name of Hertz, Warner and thereafter sold? A. Yes, sir.

Q. When was that, sir? A. Approximately mid-September.

Q. And how did you learn that fact? A. We were—when I say we, the firm of Hertz, Warner was asked to deliver 2000 shares of Telephone to another broker who had sold those shares for the account of Hertz, Warner & Company.

Mr Goldstone: Can we get a date, your Honor?

(59) Q. Can you give us the approximate date of this? A. September, middle September or thereabouts.

Q. After learning that fact did you do anything, sir? A. Yes, sir.

Q. What did you do? A. I went to my attorneys and we inquired or inquiries were made of the American Telephone Company, who was the transfer agent for themselves, as to the facts concerning the retransfer of the telephone shares so that they made them available in the name of Hertz, Warner.

Q. I show you what has been marked Plaintiff's Exhibit 5 for identification, a letter dated November 11, 1970 to AT&T from Peerless Mills, and ask you whether that is one of the documents which you participated in the preparation of together with the attorneys that you have mentioned. A. That is correct.

Mr. Genovese: I offer Plaintiff's Exhibit 5 for identification into evidence.

Mr. Goldstone: No objection.

(Plaintiff's Exhibit 5 for identification was received in evidence.)

(60) Q. On or about December 17, 1970, Mr. Cohn, did you receive a copy of a letter addressed to Mr. Fine from Miss Clundt of AT&T? I show you Plaintiff's Exhibit 6 for identification. A. Yes, sir.

Mr. Genovese: I offer Plaintiff's Exhibit 6 in evidence, your Honor.

Mr. Goldstone: No objection.

(Plaintiff's Exhibit 6 for identification was received in evidence.)

Q. Did you receive a copy of a letter addressed to Mr. Fine, again from Miss Clundt of AT&T, dated December 22, 1970, Mr. Cohn? A. Yes, sir.

Paul Robert Cohn—By Mr. Genovese—Direct

Mr. Genovese: I offer Plaintiff's Exhibit 7 for identification in evidence, your Honor.

Mr. Goldstone: No objection.

(Plaintiff's Exhibit 7 for identification was received in evidence.)

Q. Mr. Cohn, going back, when was it that the AT&T securities were first put into Hertz, Warner as your capital contribution? A. Approximately October of 1969.

Q. And what happened to the dividends on that (61) stock after it was put into Hertz, Warner, sir? A. Dividends as they were paid were credited to my capital account. I drew a check or the firm issued a check payable to me for the amount of dividends. Those checks were endorsed by me and forwarded to Peerless.

Q. Now, did there come a time when those dividends ceased to be credited to your capital account so you in turn could not forward them to Peerless? A. Yes, sir.

Q. Do you recall when that was approximately? A. April of '70.

Q. Now, have you made a review to determine the dividends that have been paid on 20,000 shares of AT&T stock since April of 1970? A. Yes, sir.

Q. Do you have the amounts, sir? A. Yes, sir.

Q. What is that? A. $21,780.

• • •

(62) Q. Mr. Cohn, did you ever determine whether the so-called Meyer-Blau group had ever signed the July 1, 1969 partnership agreement, Plaintiff's Exhibit 1 in evidence? A. Yes, sir.

Q. When did you determine that, sir? A. March-April period of 1969.

Q. Had they in fact signed the agreement? A. No, sir.

• • •

(63) *Cross examination by Mr. Lipkin*:

Q. Mr. Cohn, you say that you have been in the brokerage industry approximately 14 years. A. Yes, sir.

Q. What firm did you start out with? A. D. H. Blair & Company.

Q. Were they members of the New York Stock Exchange? A. Yes, sir.

Q. Were they members of the stock exchanges? A. Yes, sir.

Q. What were your duties at D. H. Blair? A. I was a trainee.

Q. What were a trainee's responsibilities? A. His biggest responsibility was to learn the industry in preparation for an examination to become registered.

Q. Did you take classes to that end? A. No, sir.

Q. There was no instruction given you? (64) A. No formal instruction, no.

Q. How did you gather the knowledge with which to take the examination? A. Through books and observing people working and asking questions.

Q. And what knowledge was required of you to become a—I gather the training was to become a registered representative, am I correct? A. Yes, sir.

Q. What knowledge was necessary to pass that test? A. General securities knowledge, some knowledge of the regulatory Acts.

Q. Did you learn how stocks were bought and sold on various exchanges? A. Yes, sir.

Q. Did you learn any part of the function of the back office? A. Not in any great detail, no, sir.

Q. Were you taught how to put in an order for the purchase or sale of stock? A. I was not specifically taught how. I observed how it was done.

Paul Robert Cohn—By Mr. Lipkin—Cross

Q. You did need to learn that information in (65) order to pass the test? A. Not specifically for the test, but ultimately to function as a registered representative, yes.

Q. And when did you take the test? A. I believe in 1961 or thereabouts.

Q. Were you required at all to learn about the financial structure of a member firm of the New York Stock Exchange? A. I don't believe so.

Q. Did any question ever come up that you recall during your training period as to various requirements of the stock exchange for firms to become members or to remain as members? A. I believe so, yes.

Q. And during that period of your training did you ever observe the functioning on the floor of the New York Stock Exchange or the American Stock Exchange? A. I don't believe during my time at D. H. Blair, no, sir.

Q. Subsequently you had observed the trading on the floor? A. Yes, sir.

Q. Did they have Quotron machines at that time? A. I don't—

(66) Q. When I say "Quotron," I mean which you could use to get an instant idea of what a stock was doing at a particular time. A. I believe they used the odd lot dealers in ascertaining last sales in round lots.

Q. Was there a ticker tape? A. There was a ticker tape, yes.

Q. Did you learn to read a ticker tape? A. Yes, sir.

Q. Was any instruction given to you with what you could or could not do as far as solicitation or taking of orders? A. Yes, sir.

Q. I take it you passed the test? A. I believe I did, yes, sir.

Q. And upon passing the test what designation were you given? A. I was a broker, registered representative.

Q. And were you licensed to be a registered representative by the New York Stock Exchange? A. Yes, sir.

Q. By any other exchanges? A. I believe I was also registered with the American Stock Exchange and the NASD.

(67) National Association of Securities Dealers? A. Yes.

Q. You then began to function as a registered representative, is that correct? A. That is correct.

Q. What period of time did you do this at D. H. Blair? A. I did not.

Q. Where did you do it? A. Lieberbaum & Company.

Q. That was your first actual job as a registered representative? A. Yes, sir.

Q. How long were you with Lieberbaum & Company? A. Approximately one year.

Q. And then from Lieberbaum you went where? A. To Hertz, Neumark & Warner—excuse me; to J. R. Williston & Beane.

Q. As a registered representative? A. Yes, sir.

Q. And during this period of time, up to and including being with J. R. Williston & Beane, is that it? A. Yes.

(68) Q. Did you earn commissions on the sales and the purchases of stock? A. Yes, sir.

Q. Were there any other emoluments that came to you at that time? A. No, sir.

Q. Bonuses, overrides? A. As a registered broker?

Q. Yes. A. No, sir.

Q. Did you at any time, up to and including your service with J. R. Williston & Beane, have any discretionary accounts? A. I believe so, yes.

Q. Would you tell the court what a discretionary account is. A. It's an account whereby a broker can exercise authority in the purchase and sale of securities without prior authority given by the customer?

Paul Robert Cohn—By Mr. Lipkin—Cross

Q. Would you say as a registered representative that in order to take on a discretionary account you would necessarily represent to the customer that you had knowledge of the industry and the purchase and sale of stock and could analyze financial information about (69) various companies?

* * *

The Witness: Yes, sir.

Q. Were you in fact able in your opinion to analyze a company as to whether its stock was in a position to be bought or sold at any given point? A. In a limited fashion, yes.

Q. I am certainly not asking you whether you would guarantee your information. Obviously nobody can do that. But you felt you had sufficient knowledge and ability to make comments, advice and suggestions, and, in fact, to purchase and sell securities for other customers without specifically asking them on these discretionary accounts? A. Yes, sir.

Q. Did you ever continue your education with regard to continuing as a registered representative in the securities industry? A. Formally, no, sir.

(70) Q. But did you continue to observe how brokerage firms were operated? A. As I functioned I learned. Every day I learned a little more.

Q. Did you become acquainted with the procedures in the back office? A. On a limited fashion, yes, sir.

Q. Did you understand how margin accounts are run? A. Yes, sir.

Q. And were you in a position then to advise various of your customers who had margin accounts whether they were close to being under margin and would be receiving margin calls? A. No, sir.

Q. But were you in a position to advise them? A. Yes, sir.

Q. Now, let's continue on past J. R. Williston & Beane. Where did you go to from there? A. Hertz, Neumark & Warner.

Q. And what were you at Hertz, Neumark & Warner? A. Founding partner.

Q. But you continued as a registered representative, is that correct? (71) A. Yes, sir.

Q. How many founding partners were there along with you. A. Approximately five.

Q. Can you name them, please? A. Myself, Irving Hertz, Ronald Neumark, Norman Carney, and Mr. Warner.

Q. And how did it come about that you became a partner of Hertz, Neumark & Warner? A. I was approached by Mr. Neumark and Mr. Carney.

Q. Approximately when? A. The summer preceding my accepting—the summer preceding October.

Q. Of what year? A. '63.

Q. '63. Now, to become a partner in this new brokerage firm of Hertz, Neumark & Warner did you have to make a capital contribution? A. I don't understand the question.

Q. I will repeat it. In order to become a partner, a founding partner of Hertz, Neumark & Warner, was it necessary for you to put up a capital contribution? A. Yes, sir.

(72) Q. And how much was that capital contribution? A. $15,000.

Q. And from that $15,000 what was your percentage of profits and losses? A. Five per cent of the profits and I don't recall the percentage of losses.

Q. Is it fair to say that Hertz, Warner & Company, one of the defendants in this action, was a successor to Hertz, Neumark & Warner? A. Yes, sir.

Q. This $15,000, where did you obtain it? A. From my father.

Q. And your father's name? A. Herman Cohn.

Q. Under what terms did you obtain it? A. I borrowed it.

Q. You borrowed it and you placed it in the firm? A. That's correct.

Q. Did you have any agreement with your father for repayment? A. I believe so.

Q. What was the substance of the agreement? (73) A. I don't recall.

Q. Did you at any time during your partnership with Hertz, Neumark & Warner add additional capital? A. Yes, sir.

Q. And how much additional capital did you add? A. I don't recall.

Q. If I suggested it was perhaps $20,000 more would that refresh your recollection? A. Again I don't remember.

Q. But you did put in additional capital? A. Yes, sir.

Q. Was it more than $5,000? A. I really don't recall.

Q. Was it more than $25,000? A. I don't recall.

Q. Where did you obtain that additional money? A. From my father.

Q. You again borrowed from your father? A. Yes, sir.

Q. Did you have any agreement as to repayment? A. I don't recall.

Q. At the time that you made these borrowings from your father, where did he live? A. In Westchester County.

(74) Q. You approached him with the idea of lending the money to you, to borrow—to put money into Hertz, Neumark & Warner, is that correct? A. I told him that I didn't have the money and I asked if I could borrow the money from him.

Q. And did he say yes? A. Yes.

Q. Did he give it to you in cash or securities? A. $15,000 was in cash.

Q. By check to you? A. I don't recall.

Q. Could it have been a check to you or cash to you?

• • •

(75) The Witness: May I have the question, please?

The Court: How did your father give you that $15,000, cash, check, what?

The Witness: Check.

The Court: Was it made out to you?

The Witness: I don't recall, your Honor.

Q. But in any event, you put the money in and you became a partner? A. Yes, sir.

Q. What were your duties as a partner? Now we are talking about 1963—I am sorry. Fix a time in 1963. (76) A. I should fix a time?

Q. Yes, please, when the firm was founded. A. October.

Q. What were your duties as a partner? A. Commission. I was a producer, customers' business.

Q. You were doing virtually the same thing you had been doing before? A. Yes, sir.

Q. And were you successful at it monetarily? A. Relatively, yes.

Q. Did there come a time that you decided not or no longer to be a partner? A. Yes, sir.

Q. When was that? A. Approximately two years after I became a partner.

Q. And who did you relay this information to? A. Mr. Irving Hertz.

Q. What did you say? A. I told Mr. Hertz, that I was disenchanted with the fact that I was not being called upon with regards to policy of the firm. I had no idea of any of the goings on; that it just appeared to me that I was (77) there to produce commission business.

Q. Did you receive any profits during those two years? A. Yes, sir.

Q. The firm was profitable then? A. Yes, sir.

Q. But you chose not to be a partner, okay.

So this conversation with Mr. Hertz took place when, in 1965? A. I can't pin it down to a month.

Q. Was it early in the year, late in the year, summer, winter? A. I have no idea.

Q. It could have been January? A. Again I have no idea.

Q. It could have been December? A. I have no idea.

Q. You continued after that point to function with Hertz, Neumark & Warner? A. Yes, sir.

Q. In what capacity? A. As a registered representative.

Q. A straight commission registered representative? (78) A. Yes, sir.

Q. Did you get any overrides, any participations of any kind? A. I don't believe so.

Q. And during this period up until the time in question, in 1968 and '69, was the firm profitable? A. I have no idea except the year that I withdrew.

Q. You knew that those years were profitable. How did you know those years were profitable? A. The year I withdrew there was a distribution of profits.

Q. During the subsequent years when you were a registered representative did you ever hear from any source that there had been distributions of capital? A. No, sir.

Q. No one in the firm whom you knew, Mr. Hertz, Mr. Carney, whomever, ever said anything or that you heard there had been a distribution? A. I didn't have that information when I was a partner; I didn't have it when I wasn't a partner.

Q. You said you had it when you were a partner. You said you received a distribution. A. When I received it.

(79) Q. But apart from that you never knew whether the firm was profitable or not? A. When I was conversing with Mr. Hertz.

Q. When? A. About my resignation, he suggested the fact that that year was going to be a profit and it would be foolish for me to withdraw at that time.

Q. Did your commission income increase with each passing year? A. Not necessarily, no, sir.

Q. Did it stay roughly equal then or in any given year did it drop precipitously? A. Towards '68 it was down.

Q. How was it in '68? A. I have no idea of the figure.

Q. You don't recall whether you did well or poorly in 1968? A. I think I just answered that. In '68 my income was down.

Q. Do you recall generally the conditions of the market in 1968? A. Not offhand, no.

Q. You stated on your direct testimony that you became attached to the syndicate department in Hertz, (80) Warner? A. No, sir.

Q. I'm sorry. I'm mistaken then. I thought you stated you started spending time in syndicate in 1968. A. I became, in essence, the syndicate department. There was nothing to attach to, to be specific.

Q. I stand corrected. And your duties in syndicate, you explained, had to do with underwritings, is that correct? A. Initially selling group participations.

Q. And then eventually underwritings, is that correct? A. Yes, sir.

Q. And as far as underwritings were concerned, did you have as part of your responsibility helping to make a decision as to whether Hertz, Warner would participate in an underwriting? A. Ultimately I was—when those opportunities were afforded to us I was involved in that decision-making process.

Q. What did you bring to that decision-making process, what things did you look for in a company in order to determine whether Hertz, Warner should become (81) part

of an underwriting, either as lead underwriter or participating underwriter? A. I didn't make analytical decisions as to a deal.

Q. I said what were the things you would consider A. The size of our participation being offered to us by the lead underwriting firm, who the lead underwriting firm was, was it the kind of stock offering that your sales force could sell, was the amount more than perhaps we could sell.

Q. Did the company itself, the company which was being underwritten, did what they did and what their abilities were having anything to do with those decisions? A. Somewhat, yes.

Q Later on when you personally, wh[illegible] Hertz, Warner would be the lead underwriter, a decision would have to be made at Hertz, Warner, am I correct, whether or not to take a company on and do their underwriting? A. That is correct.

Q. And as part of the decision whether or not to underwrite them, was it necessary for you to examine the financial conditions of these companies? (82) A. That was not a decision of syndicate, a syndicate decision.

Q. But what the substance of a company was, didn't it have to do with the determination of whether to underwrite them? A. That was not my determination, no, sir.

Q. I didn't ask you that. I said did that have something to do with it? A. As far as my function?

Q. No, just as far as the function of Hertz, Warner, of any brokerage company. A. Yes, sir.

Q. And these companies, in order to go public, did they for the most part supply certified financials? A. Audited.

Q. Excuse me? A. Audited financials.

Q. Am I mistaken, did Hertz, Warner do any Reg. A offerings, where certifieds are not required? A. Not that I believe.

Q. So on a full registration would you agree with me that certified financials are required? A. Yes.

Q. Who from Hertz, Warner did the investigation (83) of these companies, who met with them, who talked to them? A. Mr. Hertz.

Q. Never you, the head of syndicate? A. No, sir.

Q. Would you say that it would be prudent, in order to determine whether to make or underwrite a company, that it would be prudent to learn all that you could about their financial condition? A. After a commitment to underwrite, yes. That was not my function, but I certainly agree with the statement you made.

Q. But the Hertz, Warner would give a commitment without examining the company? A. Hertz, Warner would examine the company, yes.

Q. But not you? A. No, sir.

Q. And no one from your department would have anything to do with what a company was composed of? A. I had no department.

Q. Well, when you were a part of syndicate, when you were syndicate. A. The decision to underwrite was made; then I (84) was brought in.

Q. You stated before that as far as discretionary accounts or any accounts that you were a registered representative on, that you would analyze company information to determine whether it was a good buy or proper to sell it, is that correct? A. My answer was in a limited fashion, yes.

Q. Well, you had to make a judgment though, isn't that correct? A. That is correct.

Q. You had to make a judgment based on what information? A. With regard to what, the purchase of a stock?

Q. Or the sale of a stock. A. With whatever is available in research.

Paul Robert Cohn—By Mr. Lipkin—Cross

Q. Which would consist of? Would it consist of financial statements? A. Yes, sir.

Q. Would you think that would be important, to know what the financial statement of a company said in relation to whether it was good to buy it or good to sell it? A. Yes.

(85) Q. Would you then think in general it would be helpful, if you were going to make an investment in a company, to know what its financial situation was? A. Yes, sir.

Q. And how would you go about finding out what its financial situation was? A. Doing some due diligence.

Q. Would you call the president of a company and say, "Are you doing well?" A. No, sir.

Q. If you called him and said, "Are you doing well?" and he said, "We are doing well," would you base your decision whether to buy it or sell on what he said solely? A. I wouldn't call the president, but to answer that question, no, I would not.

Q. You would not think it was prudent, would you? A. That is correct.

Q. Did you sign a partnership agreement in 1963 with Hertz, Neumark & Warner? A. Yes, sir.

Q. Before you signed that agreement did you have an attorney look it over? A. I don't recall.

(86) Q. But you did sign it? A. Yes, sir.

Q. Did you hold yourself out at that time to be a partner of Hertz, Neumark & Warner? A. I was a partner of Hertz, Neumark & Warner.

Q. And you told people you were a partner? A. That's correct.

Q. Is there prestige to being a partner of a member firm? A. Yes, sir.

Q. It's a desirable thing? A. Yes, sir.

Paul Robert Cohn—By Mr. Lipkin—Cross

Q. Now, with regard to your becoming a partner in Hertz, Warner, did it ever occur to you or did you have a conversation with anyone prior to the time of the '69 partnership, and after you were no longer a partner in 1965—did you ever have a conversation with anyone in which you expressed a desire to be a partner? A. No, sir.

Q. Did you ever regret having terminated your partnership in 1965? A. No, sir.

Q. Did you know or find out in any fashion that, at the the end of the 1968 fiscal year there had (87) been a profit in Hertz, Warner of approximately $2.5 million? Have you ever heard that figure before? A. Yes.

Q. And at that point did you wish that you had been a partner? A. I suppose, yes.

Q. You would certainly have made more money if you had been a partner then, wouldn't you? A. Correct.

Q. So then going into 1969 you did have a feeling that you would prefer to be a partner; am I correct? A. A feeling? To be recognized and if that's what it took, yes.

Q. How about just for the money? A. If I could make more money and can make more money in changing my position, certainly.

Q. It did appear to you at the end of the 1968 fiscal year that you could, based on that last year, make more money than you were making at that time? A. No, sir.

Q. You said that you knew about the profit? A. You were referring, if I recall correctly, to 1965.

Q. '68. (88) A. Oh, then. I'm sorry.

Q. I asked you before whether you had learned at any time that in the 1968 fiscal year there had been a profit of $2.5 million. A. I misunderstood we were running in between my withdrawing as a partner and regrets because of profit, I misunderstood that question and I thought you were referring to 1965, when I terminated and there was a distribution based on a profit.

Paul Robert Cohn—By Mr. Lipkin—Cross

Q. And so I will ask you again, when you heard about a profit of $2.5 million in 1968, did you then wish that you had been a partner? A. I did not hear of a 1968 profit. I only heard of one profit from Mr. Warner. I had no access to that information.

Q. You didn't know that the firm of Hertz, Warner was profitable? You never saw a published, printed financial statement that was sent out to customers? A. No, sir.

Q. You are not aware that there is some requirement that periodically the people who have accounts on which Hertz, Warner is holding securities and holding margin accounts, that the customers be informed of the financial status of the company? (89) A. Balance sheet, I believe.

Q. Would that reflect a profit, would you think? A. Possibly.

Q. So your customers received it but you never received it? A. No, sir.

Q. You never made any inquiry into whether there was a profit or not? A. I had the feeling that the firm was doing well.

Q. If a customer would ask you, "Why should I invest with Hertz, Warner?" what would you have said? A. Because we are an on-going concern and can supply the proper service to you.

Q. If they asked you, "Do you have enough capital?" what would you have said? A. Yes.

Q. Based on what? Based on no information? Based on a guess? A. Based on the fact the stock exchange allowed us to be in business.

Q. Is it possible you could be in business on a marginal level or you can be in business with lots of money? (90) A. Sure.

Q. You didn't think it was important whether they were marginally in business or with lots of money? A. It really

didn't cross my mind, no. As far as my customers were concerned, we were in business. I felt that the regulatory bodies controlled the functioning of firms and therefore if we were in business we were healthy.

Q. Were you aware in 1968 whether the securities industry as a whole was doing well or not? A. The industry was, if my memory serves me, suffering the pains of volume, increased volume.

Q. Was it also, can we say, a bull year, 1968? A. With regards to what?

Q. With regards to trading volume, price rises, underwritings. Generally, would you say—you are a part of the industry, you have many years' experience—would you be able to say to somebody it was a bull market in 1968? A. It was a year of substantial volume. It was a good year.

Q. Would you say it was a bull market? A. I don't know.

Q. You never used the term "bull market" or (91) "bear market"? A. Sure.

Q. Was it a bull market or bear market that year? A. I don't recall. I recall it was a year of intensive market activity, heavy trading volume.

Q. I show you a printed financial statement dated November 2, 1969 and ask you whether you have ever seen this before. A. I don't recall. I might have.

Q. I can put a witness on the stand later who will testify these were distributed to the customers and hence to the registered representatives. You did receive copies of all confirmations, didn't you? A. Customers?

Q. You receive copies of what was sent out to customers, did you not? A. Their statements, yes.

Q. You were perhaps, and that is the issue in the case, perhaps you were a partner on November 2, 1969, is that correct?

Paul Robert Cohn—By Mr. Lipkin—Cross

This is as of November 2nd. This is at a period when you believed you were a partner, is that correct?
(92) A. Yes, sir.

* * *

Q. I believe you did testify that you had heard about a $2.5 million profit, is that correct? A. As relates—I got confused—to 1965.

Q. Did you ever hear of a $2.5 million profit? A. Did I ever? Yes.

Q. When did you hear of it? A. I don't recall. It could have been from Mr. Warner in our discussions.

Q. So you heard of it at a time prior to the time that you became a partner, is that correct? A. Very possibly, yes.

(93) Q. And just quickly, if there was a profit of $2.5 million, what would one point be worth? A. 25,000.

Q. 25,000. Three points would be worth $75,000, is that correct? A. Yes, sir.

Q. Those profits are above draw? Theoretically somebody could have made their draw and $25,000 a point, is that correct? A. That's correct.

Q. So then you would think at that time it would be desirable to become a partner, would you not? A. If in fact that figure I could retroactively participate in, certainly.

Q. But even based on that it would seem to you at that time that Hertz, Warner had been a profitable firm, is that correct? A. At the time I spoke to Mr. Warner and through that which Mr. Warner told me I had no doubt that Hertz, Warner was a profitable firm.

Q. And they had been profiitable up through when? A. December. He told me that the profit through December, first half of the fiscal year, was approximately $1 million.

(94) Q. At that time did he make any statement as to what the profit was from January? A. Ford?

Q. Ford. A. He gave no specific figure but to say there was no reason to think that the situation would change from that which had occurred for the first six months of the year.

Q. What did you say when he said that to you? A. I don't think it elicited a particular response at the moment.

Q. Did you say, "That's nice"? A. I am sure I said certain things depending on what particular meeting.

Q. Did you say to prove it to me? A. No, sir, I don't believe.

Q. In other words, you just took it at face value whatever Mr. Warner had said, is that correct? A. That is correct.

Q. And whatever decision you would make you based upon what Mr. Warner had said in general terms about it looked good? A. There were no general terms with regards to a specific million dollars booked. Our conversations (95) took place after that period of time.

Q. Didn't they in fact took a profit of a million dollars through the end of 1968, the first half of the fiscal year? A. Mr. Warner said that through December for the first half of the fiscal year we booked, booked a million-dollar profit.

Q. That in fact was correct, was it not? A. I believe, yes, it was.

Q. It was correct. So then he made no representations as to what was going on in the spring? I think you have testified to that, is that correct? A. The conversation I had, there was nothing going on currently to change that picture which had brought them profitably through the first half of the year.

Paul Robert Cohn—By Mr. Lipkin—Cross

Q. Did he state to you specifically: we are going to make X amount of dollars for the end of the year? A. He said, "We made a million. We can annualize that figure and we can work from there. We could make it $5 million, too."

Q. When I asked you quickly to figure out on $2.5 million what each point was worth, you understood it? A. I could annualize a million. I could (96) figure two points or three points of $5 million.

* * *

Q. So he could also have said annualize $2 million, is that correct, and you could have figured potential points based on $2 million in profits? A. That is correct.

* * *

(97) PAUL ROBERT COHN resumed.

Cross-examination continued by Mr. Lipkin:

Q. Mr. Cohn, you stated before we took our luncheon break that you resigned your partnership in Hertz, Neumark & Warner in 1965 because you weren't getting sufficient information, is that correct? A. Yes, sir.

Q. But then you entered into a partnership in 1969, is that correct? A. Yes, sir.

Q. What information did you ask for then? Did you ask for information? A. No, sir.

Q. So then you resigned for one reason and you became a partner collaterally for the opposite reason, is that fair to say? A. Basically, yes.

Q. Let's go back in the period prior to the time—months prior to the time that you had your conversations with Mr. Warner. Were you aware of any material changes in Hertz, Warner? A. Yes, sir.

(98) Such as? A. They were changing the mix of their business?

Q. In what way? A. The decision was made by the executive committee—

Q. The executive committee being whom? A. Mr. Hertz, Mr. Carney, Mr. Warner and Mr. Saluc.

Q. Was the firm operated through the executive committee? A. That's correct.

Q. Do you know who delegated to the executive committee the running of the firm? A. The partnership agreement.

Q. The partners? The partners gave the executive committee the right to run the day-to-day affairs, correct? A. Through the partnership agreement, I would say correct.

Q. Were you aware prior to the time that you spoke to Henry Warner with regard to a potential partnership that Hertz, Warner had consolidated its business? A. I believe they were in the process of consolidating their business and changing the mix of their (99) business.

Q. How were they consolidating? A. They were converting from a retail-oriented business to a professional—

* * *

A. (continuing)—business. The decision was made that retail branches be sold, retail brokers be consolidated under one roof, so to speak, and that more effort be given to the areas under Mr. Warner's responsibility, such as inter-exchange arbitrage, specialization, market-making, those professional areas of business.

Q. Did you know how many branch offices there were? A. I'd be guessing but at our largest, when we had our maximum number of branches, I would guess (100) somewhere around 10 or 11. I'm not precisely sure as to the number.

Q. Were these in various parts of the country? A. All but two—all but three were pretty much consolidated in the tristate area.

Q. Did you ever visit any of these branches? A. Yes, sir.

Q. Do you know the reasons for the consolidation? A. The reason for one sale specifically, yes. We had a branch in Beverly Hills, California, and I believe one other in that immediate locale was being opened. Problems arose unique to that branch due to the fact that it was so much further away from our operational section that a decision was made, specifically because of those kinds of problems, lack of control, so to speak, to close that particular branch.

The reasons for the consolidation, as were explained to me, were more profit potential, since were already—Mr. Warner was already in the specialized areas, more profit potential was visible in these areas of specialization, that why not have the best of both worlds, have your best retail contained under one roof and also have the ability, since Wall Street is somewhat (101) of a capital-intense industry, to be able now to apply more capital for more profits in these specialized areas.

Q. Do you know of other firms, other Wall Street firms, who at this time were selling off branch offices? A. Not off the top of my head.

Q. If I would mention, for instance, Hornblower, Weeks, a brokerage company with many branch offices, were you aware whether they were selling off their branch offices or not? A. We are talking about the same period of time?

Q. Same period of time. A. I was not aware, no, sir.

Q. So Hertz, Warner selling their branches then was somewhat unique at the time in the brokerage industry?

A. I don't believe unique as a practice. It was as I just testified, the best I knew at the time there was no one else doing it.

Q. Did it give you any pause that perhaps Hertz, Warner was not doing as well? A. No, sir.

Q. It didn't cause you to make any inquiries (102) whatsoever? A. The explanation was quite logical that was given to us after the decision to make this conversion.

Q. You believed it? A. Yes, sir.

Q. Did you ever question, when you were speaking to Henry Warner about a potential partnership—did you ever question him as to the closing of the branch or the selling of the branch offices? A. I could possibly, and I don't recall specific instances, but it would not have been unlikely for me to ascertain progress on any possible negotiations because Mr. Warner was one of the partners responsible for negotiating sales of branches.

Q. Weren't you apprehensive that in some way the closing down of branch offices would limit your activities in syndicate? A. No, sir. It could have made my life much more easy.

Q. But it also could have reduced the amount of outlets that you might have for underwriting stock, couldn't it? A. By physical location but not necessarily volume. So that is not a true statement.

(103) Q. But it is a possibility? A. Anything is a possibility, but based on the nature of our syndicate business, while we may have had—and I don't recall the number of offices—300, 400 salesmen, maybe 20 per cent of those salesmen or 30 per cent of those salesmen were really responsible for 90 per cent of our syndicate performance. And part of the described plan was to incorporate the best of our retail salesmen where possible and bring them into New York.

So that I would still have, while outwardly the appearance of less numbers of branches to distribute to, in reality the same productivity, the production within house.

Q. Did you think it was good business judgment to do it? A. I relied on what I was told and I did not question nor did I find any objection to it.

Q. You didn't find in that period of time—didn't you find anything to call objection to? Didn't you find anything in the brokerage industry at the time or in Hertz, Warner to ask questions about? A. I was very much involved in my area. I was very busy in my area and quite content in what I was (104) doing and found no cause for alarm.

Q. Between the period 1963 and 1965, when you were a partner of Hertz, Neumark & Warner, did you become an allied member of the New York Stock Exchange? A. Yes.

Q. Tell the court what the requirements are for being an allied member of the New York Stock Exchange? A. One is you must pass a written examination. Secondly, you must take—give oral testimony before a section of the board of governors of the New York Stock Exchange, testimony which would include the fact that you have read and would abide by the rules and regulations of the constitution of the New York Stock Exchange.

I believe further if there is capital contributions—and I'm relating it because I recall this is what was asked of me—what that would be and under what circumstances contributions would be made. Also, percentages, I believe, was another question.

Q. Did you finish the answer? A. Yes.

Q. What greater knowledge would it take to be an allied member as opposed to a registered repre- (105) sentative which you had previously been? A. I could only relate

personally, and as far as I am concerned when I took the test, and that which I was required to pass, in my instance not much more.

Q. Would an allied member in effect be a person who would be qualified to run a brokerage firm? A. I would imagine, yes. That's a fair statement.

Q. So then ostensibly you were in a position then, as far as the stock exchange was concerned, to run a brokerage house? A. I don't know whether that is true or not.

Q. Didn't you in effect represent to the stock exchange that you were qualified to do so? A. In a way, yes. Whether I was or not—I mean I had enough knowledge, I learned enough to qualify me to pass the examination. If that can be extended beyond and beyond, that's something else.

Q. Are you aware of the requirements of the New York Stock Exchange with regard to the filing of financial reports of member firms? A. Not specifically. I know they are required.

Q. Do you know on what basis they are required timewise? (106) A. I believe once a year.

Q. If I were to tell you that it is once a month for a firm that's operating normally and has sufficient capital, what would you say then? A. I would yield to your statement, if it be a fact.

Q. If I were to tell you that companies that are on the borderline, they must report their capital weekly? A. I'll yield again, if that be the case.

Q. Then you would also yield if I would say to you that Hertz, Warner filed monthly financial statements with the stock exchange? A. I was not aware of it.

Q. But as an allied member you could have been aware of it or should have been aware of it, isn't that a fact? A. Not necessarily.

Q. It was one of the requirements of knowledge to become an allied member, how a brokerage firm operates and how it is associated with the New York Stock Exchange? A. In its philosophical and broader sense, correct. I had a specific function in that firm which (107) narrowed the area I was working.

Q. When you testified before the board of governors they didn't ask you specifically with regard to syndication, they asked you generally with regard to what the functions of a stock brokerage firm are, is that correct?

* * *

A. I don't think specifically as to the functions what a brokerage firm did were the questions that were asked of me, no, sir.

Q. They didn't ask you at all how the back office of a firm operates? A. No, sir.

Q. What did they ask you? A. They asked me did I read the constitution; would I abide by its rules and regulations; what was my equity participation to be in the firm; what was my loss ratio to be in the firm; what the capital contribution was to be; if that was to be a borrow, and to explain (108) in essence what it was.

Q. Don't the rules and regulations of the stock exchange set forth the financial requirements of its members? A. I'm sure they do.

Q. Then you said or you told the board of governors that you had read them, is that correct? A. That's correct.

Q. You told the truth when you said that? A. Yes.

Q. Then you had read them? A. The rules, regulations, constitution, yes, sir

Q. When you told them you knew their contents, was that correct? A. Yes, sir.

Paul Robert Cohn—By Mr. Lipkin—Cross

Q. If you knew the rules and regulations with regard to monthly financials, did you know that monthly financials were prepared for Hertz, Warner & Company?

* * *

A. Specifically, no. No, sir.

Q. And you never asked for them, is that correct? (109)

A. At this period of time, no sir.

Q. Did you ever ask Henry Warner for them during the March-April period when your partnership was being discussed? A. No, sir. I relied strictly on what Mr. Warner told me.

Q. What did he tell you? A He told me that I was being offered a 3 per cent partnership in the firm. He expressed to me what my loss ratio would be. He told me what my capital contribution would have to be. He told me what the firm's profits were through the period ending December for the preceding six months. He explained to me and justified in my mind quite vividly the fact that I was not taking a cut in salary from $33,000, as I was making prior to becoming a partner of the firm, to $15,000, which was the deal on the table, and explained to me why and how I would not be making less money by becoming a partner of Hertz, Warner.

Q. On the basis of those conversations you obtained $100,000 or 2000 shares of AT&T stock and you them into Hertz, Warner, is that correct? A. Yes, sir.

Q. Solely and exclusively on what you said Henry (110) Warner said to you? A. That plus the conversation we spoke about with Mr. Hertz.

Q. Solely on that; you didn't ask for a document? A. No, sir.

Q. You didn't ask to have someone examine the books for you? A. No, sir.

Q. You didn't take into account that there was—the branch offices had been sold off? A. In the process of being sold off, no sir.

Q. You didn't take into account what was generally regarded as a back-office crunch all around Wall Street? A. Back-office crunch due to increased volume. Big difference in my mind.

Q. You didn't take any of these factors into account, only the fact that Henry Warner made these general statements to you and you said, "Good, here is my $100,000"? A. No, sir, that is not so.

Q. What is so? A. They were not general statements. Our conversations, as I testified earlier and I will do again, (111) were specific. I was asking questions as to how would I make more money than I'm making now by accepting a partnership with Hertz, Warner and at face value or stated value be making less than half what I was making before we discussed the situation.

Q. You have admitted that there was a million-dollar profit for the first six months of fiscal 1969, from July 1st to December 31, 1969; you have already admitted to that, is that correct? A. That's correct.

* * *

Q. For the first six months you have already admitted there was a million-dollar profit. And after that you say that no representation was made to you as to dollar amounts of profits or losses in Hertz, Warner subsequent to January 1, 1969, is that correct? A. Except for the statement that I made already that Mr. Warner said he had no reason to believe that anything would change the picture that had created the million-dollar profit through December, '68.

* * *

(112) Q. And you chose to rely on those words, to obtain $100,000 to put into the firm? A. I relied on the conversations with Mr. Warner and what was told to me to do that.

Q. You said what he told you was that business looked all right? A. I didn't say that's what he told me, that business looked all right.

Q. Or that he had no basis to believe that things were going to go sour? I am paraphrasing but that's the extent of the conversation, isn't it? A. It loses something in the translation.

Q. That's not responsive. A. I will continue if you want.

The conversation was and that which was transmitted to me, it was important to me that nothing was occurring since the firm booked a million-dollar profit to change the picture at Hertz, Warner and would change the course of profitability or the continuance of that book profit for the balance of the year.

Q. Did he say to you that there would be another million dollars in profit for the latter six months of (113) the year? A. He said he could annualize that and then we applied the 3 per cent to the situation.

Q. Did he say, "We will have a million dollars profits for the six months ending June 30, 1969"? A. In those specific words, no, sir.

Q. He didn't; he just said, "Annualize it and go figure out how much you could make if you had a piece of the action"? A. No, we both figured it out.

Q. And if he had said there could be $5 million in profits, could you figure out what three points on $5 million in profit would have been? A. Yes, sir.

Q. Now, you stated on direct examination this morning that you then did not discuss the proposed partnership with anyone else at Hertz, Warner, is that correct? A. I said—that is correct.

Q. Who did you discuss it with? A. I discussed it with my parents and my in-laws.

Q. Now, let's talk about your in-laws. Their names? (114) A. Mr. Fine, Abraham Fine, and Mrs. Margaret Fine.

Q. When did you first meet them? A. I was married in '68. Probably about March, April, I believe, of '68.

Q. Do you know if Mr. Hertz or Mr. Warner ever met your in-laws? A. Yes, sir.

Q. When? A. At my wedding.

Q. When did your wedding take place? A. September of '68.

Q. Where was that? A. The Plaza.

Q. In New York City? A. That is correct.

Q. Do you know if Mr. Hertz and Mr. Warner had a conversation with your in-laws? A. I do not.

Q. Subsequent to that, did they ever meet your in-laws, either one of them? A. I don't believe so, no.

Q. Do you know if they ever had a conversation with your in-laws subsequent to your wedding? (115) A. No, sir.

Q. So that in point of time in March or April you spoke to Henry Warner, you were offered a partnership and then you conveyed information to your in-laws, is that correct? A. Yes, sir.

Q. Was your intention to obtain money from them in order to make your partnership contribution? A. My first conversation was with them and my parents about the fact that a partnership proposal was made to me.

Q. What did you tell them? A. Exactly what I testified to. Shall I repeat it?

Q. Please. A. That I met with Mr. Warner, a partnership offer was made to me. I was to have 3 per cent of the profits, 4½ percent of the losses. They were thrilled, I was thrilled, we were all quite excited about it.

I also explained to them that my salary would be reduced by accepting the terms of what Mr. Warner offered me and explained to them the arithmetic that was explained to me and how my income would be substantially increased (116) by becoming a partner of the firm and that my future was very exciting.

Q. What did your in-laws say at that time? A. They were thrilled, as was my parents, as was I.

Q. Did you tell them anything about Hertz, Warner & Company? A. Not that I could recollect, not other than in the arithmetic the million-dollar figure was I combined in my statement for simplicity the fact that I gave them the arithmetic to justify the increment in my earnings. If you want, it was all part and parcel of that arithmetic, was the representation to me that the firm booked a million dollars through December; that there was no reason in his mind to consider that that line of profitability should not be continued throughout the year.

We went through the specifics of 3 per cent of this, that and the other thing; the fact that there could accrue to me from the Hertz, Warner affiliated corporation and the fact that if my performance in my area of responsibility, mainly syndicate, continued bonus situations could accrue to me.

Q. May I read to you from the deposition of (117) Margaret Fine, which was had under oath August 31, 1971.

Margaret Fine is your mother-in-law, is that correct? A. That is correct.

Q. I will read this:

Q. What did Mr. Cohn tell you''—

Mr. Genovese: Page, please?

Mr. Lipkin: Page 19.

''Q. What did Mr. Cohn tell you? A. Regarding the money, regarding the loan or what?

"Q. Regarding the 2000 shares of AT&T stock and regarding the execution of these documents. What inducements were made to get you to sign the documents and what was told to you, et cetera? A. Well, they sort of solicited Paul Cohn to become a partner in the firm and that it would require some money, which was loaned to Paul in the form of 2000 shares of AT&T stock.

"Q. Is that all? A. Well, that's briefly all I can mention. He would become a partner of the firm but that he would have to submit or give his money to Hertz, Warner.

"Q. Did Mr. Cohn say anything else, that (118) any other representations had been made? A. To him?

"Q. Yes. A. Nothing that I can remember or think of. Nothing that I remember, no."

Now, you have just described to us in some detail all of the statements that you allege Mr Warner had said, and your mother-in-law, whose deposition was taken for Peerless Mills, says she can't remember any of it. Can you account for that?

Mr. Genovese: Objection, your Honor.
The Court: Sustained.

Q. Did you in fact make these statements to her? A. Yes, sir.

Q. Then she is incorrect when she says she can't remember you making any of these statements?

Mr. Genovese: Objection.
The Court: Sustained.

Q. These conversations with Peerless or your in-laws took place in the spring of 1969, is that correct? A. Yes, sir.

Q. And did you then come back to Hertz, Warner and agree to become a partner as of July 1, 1969? (119) A. Yes, sir.

Q. When finally did the money or the stock come into Hertz, Warner? A. On or about October of '69.

Q. Do you recall signing any agreement with your in-laws or with Peerless Mills with regard to the 2000 shares of Telephone stock? A. Yes, sir.

Q. I show you an agreement and ask you whether you recognize it.

> The Court: It would be useful, gentlemen and lady, if you show people documents, that you have them marked for identification before that. It will be clearer what we are talking about.
>
> Mr. Lipkin: May we mark this, please.
>
> (Third-Party Defendant's Exhibit B marked for identification.)

Q. I ask you whether you can identify Third-Party Defendant's Exhibit B for identification. A. Yes, I do. That is my signature.

Q. Is that the signature of Mr. Fine? A. Yes, sir.

Q. And what is this agreement? A. It's a securities loan agreement between (120) Peerless and myself.

> Mr. Lipkin: I offer this in evidence.
>
> * * *
>
> (124) (Third-Party Defendant's Exhibit B was received in evidence.)

By Mr. Lipkin:

Q. Now, you stated that you were a party to this agreement, is that correct. A. Yes, sir.

* * *

Paul Robert Cohn—By Mr. Lipkin—Cross

Q. Now, upon the signing of that securities loan agreement between Peerless Mills and Paul Cohn, (125) what did you then do. A. Both the securities, proper stock powers and the agreement were received by me and given to Mr. Joel Held.

Q. And when was that? A. Some time in October, I believe, of 1969.

Q. The agreement is dated October 31st, so could it have been after October 31st? A. Very possibly.

Q. Now, when did you receive the agreement, the partnership agreement? A. Prior to December.

Q. But in fact after the stock had already been given over to Hertz, Warner, is that correct? A. Yes, sir.

Q. So you had received the stock from your in-laws, you signed the stock loan agreement, securities loan agreement, and then you handed the stock into Joel Held at Hertz, Warner? A. Yes, sir.

Q. Subsequent to that time Hertz, Warner, Joel Held, I believe, sent you the agreement, is that correct? A. Joel Held brought me the agreement, yes.

Q. And he brought it to you and he sent it to (126) you at a time subsequent to all these discussions about putting up the capital and so on? A. Yes, sir.

Q. At a time subsequent to your conversations with Henry Warner, is that correct? A. That is correct.

Q. At a time subsequent to when you agreed to become a partner? A. That is correct.

Q. What is the status with this stock now and your in-laws?

Mr. Genovese: Objection.

Mr. Lipkin: I will rephrase it.

Q. Have your in-laws made demand on you for the stock? A. No, sir.

Q. Have they expressed an intention to sue you for the stock? A. No, sir.

Q. Have they hired anybody to make a demand for the stock? A. Of me?

Q. Of you. A. No, sir.

(127) Q. Now, with regard to your status whether or not in fact you were a partner, as of July 1st did you hold yourself out to anyone as a partner of Hertz, Warner & Company? A. '69?

Q. Yes. A. Yes.

Q. You told people you were a partner? A. Yes, sir.

Q. You thought you were a partner? A. Yes.

Q. Amongst other people you thought you were a partner, is that correct? A. Yes, sir.

Q. Did you ask Henry Warner in March-April of '69 who else were going to be the partners? A. It was mentioned to me that coming in with me under this new agreement, the new partnership agreement, Mr. Sadlier and Mr. Held would be coming in as partners.

Q. And that the other partners, the other partnership was remaining? A. There was no discussion as to from one partnership to the other.

(128) Q. Did you ask what the capital of the new firm would be? A. No, sir.

Q. Didn't it seem to be important to know how much money was being backed at Hertz, Warner? A. At the time of these conversations, more specifically when the request was made of me for my capital, I was more concerned as to how I could raise my own capital contribution.

Q. Wouldn't you in fact, in advising a customer, have requested more financial information than you asked for yourself? A. With regards to a customer in the purchase of securities, yes.

Paul Robert Cohn—By Mr. Lipkin—Cross

Q. As regards to being a syndicate manager, in determining whether Hertz, Warner should underwrite a company wouldn't it be prudent to ask for all this financial information? A. Yes.

Q. Then wasn't it in fact not asked by you of Hertz, Warner and not related to your in-laws for the reason that the money was easy to get? A. No, sir.

Q. Didn't you think there was any responsi- (129) bility, knowing your in-laws were willing to put up that kind of money, to get them information?

Mr. Genovese: Objection.

The Court: No, I will allow it.

A. The obligation I felt I satisfied by telling them exactly what was told to me.

* * *

Q. Didn't you in fact not ask for the information because the money was forthcoming, because you knew you would have no problem in getting it, because you didn't have to go to a bank to obtain it and supply information?

Mr. Genovese: Objection as argumentative, your Honor.

The Court: No, I'll allow it.

A. Which one?

The Court: Answer the whole business. Were those or were they not the reasons?

The Witness: No, they were not.

The Court: Next question.

* * *

(130) Q. Are you the defendant at present in an arbitration action by Hertz, Warner & Company before the New York Stock Exchange? A. Yes, sir, I believe so.

Q. Do you know the subject of that action? A. If I recall correctly, it is for moneys owed the partnership.

Q. In what capacity? A. In my capacity as partner.

Q. How much money is being asked of you? A. I don't recall offhand.

Q. If I would suggest 172,000, would that refresh your recollection? A. Possibly.

* * *

(131) Q. I take it you are not sure whether it is $172,000. Do you have any idea what the figure is?

Mr. Genovese: Your Honor, I object to the arbitration as not being relevant to any issue in this proceeding.

The Court: I will allow it.

A. Could I have the question again, please?

The Court: Yes.

(Question read.)

A. Offhand no, but from my best recollection it is substantially. By substantial, not five or ten thousand dollars.

Q. Is it more than $20,000? A. To my recollection, 100,000-plus. But again—

Q. Plus what? A. I don't know. I have answered the question. I don't know the specific amount of money that is up in the arbitration.

Q. Is it less than $250,000? A. Yes, sir.

Q. Now, you testified, I believe, on direct examination that the stock was put into Hertz, Warner, (132) the Telephone stock, is that correct? A. Yes, sir.

Q. And it was put into your capital account? A. Eventually, yes.

Q. Labeled "Paul Cohn, Capital Account, Hertz, Warner & Company," is that correct? A. There was some problem with the way the statement originally came up. It was an old name and it came up under the name of Burt Gusrae.

Q. But was it corrected to denote that it was Paul Cohn? A. Yes, sir.

Q. Your capital account? A. Yes, sir.

Q. Did you represent to Hertz, Warner it was your stock to give to them? A. Yes.

Q. Did you represent it was free of all encumbrances or liens? A. I signed the agreement. Whatever the agreement said is what I assume I was doing.

Q. What did you assume the agreement said? It said there were no liens on the stock, didn't it? A. That I borrowed money for the purpose of (133) making a capital contribution to the firm and that lender to me, based on what the agreement says, had no recourse to Hertz, Warner.

Q. The lender being the plaintiff in this action, Peerless Mills? A. That's correct.

Q. Now, the stock going into your capital account. What happened with the dividends? A. The dividends, as they were declared and ultimately paid, were credited to my capital account. A check was drawn by the firm to me—

Q. Not to Mr. and Mrs. Fein, not to Peerless Mills; to you?

Mr. Genovese: He didn't finish answering the question.

The Court: Let him finish the question. Go ahead.

A. Checks were drawn by the firm payable to me. Those checks were endorsed by me and forwarded to the Feins.

Q. Each and every check that you received on dividends? A. That is correct.

Q. You didn't retain any of them? (134) A. No, sir.

Q. Now, with regard to the Meyer-Blau group, as I think we can agree we can designate them as that, what statements were made to you with regard to their coming—with regard to their being a part of the 1969 agreement. A. That Mr. Hertz informed Mr. Held that the agreement for the '69 partnership was signed by Meyer and Blau, was at the affiliate to be delivered back down to the firm, to Mr. Held.

Q. You testified that occurred in January or February of 1970, is that correct? A. No, sir—excuse me, wait. There were several instances. If I may correct myself, when I signed the agreement that is a question I asked of Mr. Held, and that is the reasons I got from Mr. Held.

Q. This is the period of time perhaps a month to two months after the AT&T stock was put into Hertz, Warner, is that correct? A. Yes, sir.

Q. And prior to that time did you concern yourself with whether Arthur Meyer and Joseph Blau signed or were going to sign the agreement? A. I didn't anticipate or have any reason to (135) anticipate anyone not signing the agreement.

Q. In fact, the agreement was sent out after you put the stock in, is that correct? A. At the request of Mr. Hertz.

Q. So that when you put the stock in the question of whether Meyer or Blau would sign was inconsequential, wasn't it? A. It was not a question in my mind, no.

Q. It didn't come into your mind at all? A. No.

* * *

Q. Are you aware that Arthur Meyer and Joseph Blau, the group, were partners under the 1968 agreement? A. Yes, sir.

Q. Are you aware that their capital that was part of the 1968 agreement did not come out to them prior to the 1969 agreement? A. No, sir.

Q. And are you aware that their capital in effect was used upon the liquidation of Hertz, Warner for (136) your benefit, for Irving Hertz' benefit, for Henry Warner's benefit, for Joel Held's benefit and for everybody else's benefit? A. I don't know whether I could specifically say whose capital was used. I know there was a settlement involving some of these people.

Q. Are you aware that they lost their capital? A. The capital that was in I am assuming was lost.

Q. Are you aware that if that capital had not been in there the arbitration against you would be for more money? A. To the extent that they were not liable under the agreement, yes, it would have caused a larger loss for me.

* * *

(137) Q. Now, when for the first time did you come to believe that you were not a partner of Hertz, Warner? A. That subject first arose in conversations with Mr. Held after the disclosures of the December-January meetings. I began to believe that fraudulent inducement was used against me and I believed Mr. Held felt the same thing. That's what caused us to seek counsel.

Q. What fraudulent inducement? A. The astounding losses that had occurred and were announced to us at those meetings. Basically it was that which initiated the conversation and the ultimate visit to Javits & Javits.

Q. How does the fact there were losses tie into a potential fraud? A. The fact that we were told all along—let me rephrase that: that I was told all along that everything was fine and there are no problems. Then all of a sudden at a meeting a substantial reversal is disclosed to me for the first time. It set my mind (138) thinking and that's what I thought.

Q. What led you to believe that Irving Hertz and Henry Warner didn't just learn about those reversals about the same time that you did? A. I was thinking of myself and that's my reaction to those statements that were made to me.

Q. But they are the subject of a fraud action. What leads you to believe that they in effect knew about reversals, didn't tell it, did it for intent of getting your money in there and so on, what leads you to believe that? A. At that point nothing more than that.

Q. In fact, you did not believe it until a subsequent date, is that correct? Well after the time you put the securities in? A. The first occurrence of that thought in my mind was then. Further evidence in my investigation truly made me believe that I did not become a partner of Hertz, Warner.

Q. Isn't it a fact that the liquidation of Hertz, Warner was going on simultaneously with the liquidation or the going out of business of many other member firms? A. I can't specifically recite any firm going (139) out of business at that moment in time.

• • •

Paul Robert Cohn—By Mr. Goldstone—Cross

Q. You were on the Street, so called, for 11 or so years at the time, 12 years, and you had no idea that brokerage companies were going out of business in 1969 and 1970? A. I don't know how we got to 1970. My specific response to you was the January-February period of—

> The Court: He is just asking you was it an item of knowledge with you that brokerage houses were going out of business in 1969 and '70? You may answer yes or no.
>
> The Witness: Yes.

Q. Isn't it also a fact that in 1967 on you and a number of other general partners asked to get more points in the firm? A. No, sir.

Q. You never asked for your points to be increased? A. No, sir.

Q. Do you recall ever seeing a memorandum to the effect that points had been increased? (140) A. I recall seeing a memo at a deposition of mine much after. That was at the first time I saw that.

Q. Do you know who that memo was from? A. I believe it was from Joel Held.

Q. Joel Held. So you have no idea whether that memo is correct or not? A. No, sir.

• • •

(141) *Cross Examination by Mr. Goldstone:*

Q. Mr. Cohn, how did you find out that the securities, AT&T securities, were retransferred to Hertz, Warner from Peerless? A. I saw the securities come back into the firm.

Q. In the name of Hertz, Warner? A. You said come back.

Q. From Peerless back into the name of Hertz, Warner over the stop transfer order. A. We were called upon to make delivery of 2000 shares of Telephone stock to an opposing broker to clean up a fail.

Q. And what happened? A. Those shares were the same shares that the stock was placed against. They were sold out as Hertz, Warner. I never saw the physical shares.

As I understand what happened, those shares were taken directly to the firm by Mr. Hertz, to clean up that fail.

(142) Q. Who told you that? A. Mr. Sadlier.

Q. Now, you told me that you testified before, am I correct, that a broker told Mr. Sadlier this or told you this. A. My answer is in the brokerage business you sell securities that are listed on the exchange, you owe those securities to the buying broker's customer. Comes settlement date you must make delivery of those securities to the opposing broker. It is through that system that I became aware that 2,000 shares of Telephone stock were sold and due to, I believe, Merkin & Company who liquidated the shares.

Subsequently I found out that the meeting when I was suspended by Mr. Hertz for purported improprieties, that Mr. Held came down to that meeting. I had previously left but I was told he was coming down, and the shares of Telephone stock in the name of Peerless were given to him and he then took them up to the Telephone Company building, to the proper department, to have them retransferred.

Q. I guess my problem with it is I just don't know, once the shares came back to Hertz, Warner you weren't

there any more, is that correct? (143) A. I said I didn't see them when they came back. I thought you were referring to them coming back in the name of Peerless. Physical shares in Hertz, Warner's name, the last transfer I never saw.

Q. But Mr. Sadlier told you those were the specific shares that used to be in the name of Peerless that had come back into the name of Hertz, Warner and now those specific shares were then sold out by Hertz, Warner, that's what Mr. Sadlier told you? A. Yes, sir.

Q. When did he tell you that? A. Some time prior to between mid-September and October, or thereabouts.

Q. Mid-September and October? A. To some time in October. I was no longer back at Hertz I believe after October, early October.

Q. When you hear this news what action did you take, if any. A. I told Mr. Sadlier that I was absolutely astounded that a stop transfer was violated. I went immediately to see Mr. Zane Klein to inform him of what had happened.

Q. Did you know the name of the broker to whom the stock was transferred? (144) A. It was not transferred—

Q. It was sold. A. Yes, sir.

Q. Did you call him? A. That I found out.

Q. Did you call up that broker and tell him you had a claim for those shares? A. No, sir.

Q. Did you call AT&T and tell them? A. There were communications.

Q. When was the first time after you had knowledge that you communicated with AT&T? A. On the sale?

Q. Yes. Whenever you found out that that stock went out over the stop transfer order, when was the first time you communicated with AT&T? A. I believe November. I am not sure exactly but there is documentation.

Q. I think this has been marked as Plaintiff's Exhibit 5. Let me ask you if that communication is the first communication? A. Yes, sir.

Q. In that communication do you make a demand from AT&T for restitution?

* * *

(145) Q. Mr. Cohn, in the correspondence with AT&T, between Peerless and AT&T with respect to the stop transfer order, did you receive copies of correspondence that went to your father-in-law, did he send you copies? A. I think copies were designated to me on some of those items that were in response to inquiries. I think I had seen them already this morning or this afternoon.

Mr. Goldstone: I have a letter to Mr. A. C. Fein dated July 29, 1970, signed S. J Williams, on American Telephone & Telegraph Company's letterhead. I would like to identify it as Defendant's Exhibit 1.

(Defendant's Exhibit A was marked for identification.)

Q. Mr. Cohn, I show you Defendant's Exhibit A and ask if you have seen that before, if you can identify it. A. I don't believe so.

Q. You have never seen that? A. No.

Q. On Plaintiff's Exhibit 5, do you know who (146) drafted that letter? A. Yes, sir.

Q. Mr. Zane Klein.

Q. Mr. Zane Klein. Did you see that letter before that was sent? A. I believe yes. Yes, I did.

Q. Do you know or did you give Mr. Zane Klein any documents, any correspondence with respect to or between AT&T and Peerless before he sent that letter?

Let me ask you another way. Mr. Zane Klein refers specifically to Defendant's Exhibit A in Plaintiff's Exhibit 5. I am just wondering how he might have gotten that. Do you know? A. Whom? You are getting me confused.

Q. How your lawyer might have gotten knowledge of this letter, of Defendant's Exhibit A. I am wondering if it would refresh your recollection as to whether you have ever seen that letter. A. I again have not seen it. I don't recollect seeing this letter but I am still confused in what is happening here.

Q. Mr. Cohn, do you know who made an original call to AT&T on July 6th which is referred to in Plaintiff's Exhibit 2, which I now show you? As I recall (147) your test nony, your wife typed that letter, is that correct? A. Yes, sir. I believe I may have made that call.

Q. You may have made that call? A. Yes, sir.

Q. Can you recall the substance of your conversation? A. No, sir, I cannot.

Q. Did you inform AT&T about the fact—did you inform AT&T that your stock certificates were lost and that was the reason you placed the stop transfer? A. Again I don't recall the specifics of the conversation, so it would only be guessing and I would not like to guess on something like this. I would have to say I don't recall specifically what was said, except a request to put a stop transfer was made.

I would imagine that a request was made back that this be confirmed in writing, which was subsequently done.

Q. Do you recall anyone from AT&T during the oral conversation with them saying, "For what reason do you want the request"? A. No, sir.

(148) Q. Do you recall telling AT&T about the true nature of your controversy with Hertz, Warner with re-

gard to the stock transfer? A. No, sir. It was a question of expediting this after speaking to my attorneys.

Q. Did your father-in-law ever inform you that AT&T believes that the securities in question were lost by Peerless? A. I don't believe so, no.

Mr. Goldstone: No further questions.

Redirect examination by Mr. Genovese:

Q. Mr. Cohn, on cross examination by Mr. Lipkin he asked you about the conversations that you may have had with Peerless regarding your partnership offer and you told him about the first such conversation. Was there a second conversation? A. Yes, sir.

Q. When, approximately, was that? A. It coincided with a meeting with Mr. Warner where I was told of my specific capital contribution, what that amount would be. The first conversation with my in-laws and my parents was of the nature of what they had proposed to me. At that first meeting with (149) Mr. Warner there was never a mention of capital.

Q. Can you tell us what was said in the second conversation with Peerless?

The Court: When you say Peerless, you mean the Feins?

Mr. Genovese: Yes.

The Court: When are you talking about?

The Witness: April.

Q. This is after you were told of your required capital contribution? A. Yes, sir.

Q. What did you say to Mr. and Mrs. Fein and what did they say to you? A. We reiterated the conversations

of the terms of the partnership and I told them that I was informed by Mr. Warner that my capital contribution would have to be in the amount of $100,000. They considered that rather large and they again or they then questioned me as to that which was told to me: do I believe and does everything look fine and so on. They wanted to be reassured.

There also was some conversation because they were not clear how they could loan me this kind of money, whether it would be convenient for them to be (150) cash, or if not cash, could they do it with securities. If it was securities, there were conversations about whether municipal bonds or Telephone stock would be the vehicle.

Q. And did you come to any conclusion? A. It was decided the Telephone stock would be that which they would give to me or loan to me to make my capital contribution.

Q. Also on cross-examination by Mr. Lipkin he questioned you regarding the signature of the so-called Mayer-Blau group to the July 1, 1969 partnership agreement, Plaintiff's Exhibit 1 in evidence.

Now, as of the time that you delivered the Peerless securities, AT&T, 2000 shares, in October, 1969, did you have any facts to indicate that Messrs. Meyer, Blau or any other partners would not sign the proposed partnership agreement? A. No, sir.

Q. Did anyone ever tell you that certain partners would not make their capital contribution? A. No, sir.

Q. So far as you knew as of that time, everyone was going to sign the agreement, is that correct? A. Yes, sir.

(151) Q. One last area, Mr. Cohn. Going back to your leaving or terminating your partnership with Hertz, Neumark & Warner, now you testified that the reason that you

terminated that partnership was in part because of the lack of information. Was there any other reason? A. The original solicitation of myself was categorized and stated verbally as a founding partner and as such I would be one of the partners involved in policy decisions. Throughout the entire course of my partnership from October of '63 to my termination some two years later I attended but one partnership meeting at Mr. Hertz' home with many, many other partners; but other than that I was never sought by Mr. Hertz or any of the other partners for counsel or invited to participate in any meetings. I was more or less kept in the dark. Questions that came up were always answered, like, "Everything is fine," or "Don't concern yourself with this. Do your production," and so on.

* * *

(152) Q. Now, Mr. Cohn, in view of your answer, do you have any knowledge or did anyone ever tell you, either Mr. Hertz, Mr. Warner or Mr. Neumark, why it was they wanted you to become a founding partner of Hertz, Neumark & Warner? A. Mr. Neumark and I had a prior association and knew of the kind of production, commission business, that I was doing, could do. And the essence of what they were trying to do in starting up a new firm, you start with production. It was a retail firm that was being formed. They came to me. As they said, "You would be doing production," that would be my day-to-day function. They were looking for my capabilities in generating commission income to the firm.

Q. How old were you when you became a partner of Hertz, Neumark & Warner? A. Approximately 23.

Q. Do you recall how much business you had at that time? A. Not offhand, no, sir.

Paul Robert Cohn—By Mr. Genovese—Redirect

Q. Now we come to the period in 1969 when you had your discussions with Mr. Warner with respect to the possibility of your becoming a partner again in the firm which is now called Hertz, Warner & Company. Did (153) anything change in that time to make your attitude different as to why you should become a partner now? A. I felt that on this go-around, this second time around with the firm, that I was being sought because I earned it, so to speak, in my creativity.

Q. In the syndicate area? A. That is correct.

Q. Not because you brought in a lot of business? A. I had no production, so to speak, at all at this point.

Q. One last question. Going back to Messrs. Meyer and Blau again, did anyone tell you that Meyer and Blau would not accept the terms of the 1969 partnership agreement prior to the time you delivered your stock as distinct from signing the agreement itself? A. What period of time, prior—

Q. Prior to October, when you delivered your AT&T stock as your partnership contribution, did anyone ever tell you that Messrs. Meyer and Balu would not accept the terms of the 1969 partnership agreement? A. No, sir.

* * *

(154) *Recross-examination by Mr. Lipkin:*

* * *

(155) Is it still your testimony that all of the things that you said Mr. Warner said to you were told to your in-laws? A. Yes, sir.

* * *

(156) *Redirect examination by Mr. Genovese:*

Q. How old is Mr. Fein? A. Eighty-six.

Q. How old is Mrs. Fein? A. Seventy-five plus a little, I believe.

* * *

Colloquy

(160) Mr. Genovese: May I offer, your Honor, as Plaintiff's Exhibit 20 in evidence the portions of the depositions of Irving Hertz and Henry Warner to which I have just alluded.

The Court: They are being handed up in this loose-leaf notebook.

Now, the parts that you say you need to delete are they physically deleted?

Mr. Genovese: Physically taken out of the book, your Honor.

The Court: So the materials that are in (161) this Exhibit 20 I am to read in full?

Mr. Genovese: With one exception, your Honor. You will note I have blocked off the particular portions so that the colloquy need not be read. In each case I have listed on the front of the particular page the parts of the depositions and then within the page I have marked out, and I have handed counsel a copy of the marked-out portions.

The Court: It is the marked-out portions that are in?

Mr. Genovese: Yes, your Honor.

The Court: Just so I will know what to read.

Between the lines or brackets is what I am to read and the rest I should ignore?

Mr. Genovese: Yes.

The Court: With that understanding we will mark this Exhibit 20 in evidence.

(Plaintiff's Exhibit 20 is received in evidence.)

* * *

Joel Held—By Mr. Fitzgerald—Direct

(165) JOEL HELD called as a witness by the plaintiff, being first duly sworn, testified as follows:

Mr. Genovese: Your Honor, my associate, Mr. Fitzgerald, will conduct the examination.

Direct examination by Mr. Fitzgerald:

Q. Mr. Held, will you give the court a brief statement of your educational background, please. A. Graduated from high school in approximately 1953, went to Boston University. I graduated in 1959—no, 1960. I went to Boston University School of Law. I graduated in 1964. I went to NYU graduate school after that. That's about it.

Q. Upon leaving the law school and graduate school, did you then enter the service? A. Yes, United States Army.

Q. During the course of that time you became a member of the New York bar? A. Yes.

Q. And subsequent to your time in service, what position or occupation did you then assume? A. I became a staff member of the United States (166) Securities and Exchange Commission in April of 1967, I believe.

Q. And how long did you continue in that position? A. Oh, approximately a year and a half, almost two years.

Q. And from the SEC, could you tell us where you next went? A. Hertz, Warner & Company.

Q. Could you tell us the circumstances under which you first made contact with Hertz, Warner & Company? A. I had known a gentleman by the name of Burt Gusrae whom I had known for some years, and he was at the time general counsel at Hertz, Warner & Company. I believe he was a partner. I had discussed with him the fact that I was looking for a position with more money than from the

Securities and Exchange Commission, and he suggested I come by and see him. I went to see him and he offered me a job with Hertz, Warner & Company.

Q. And did you take the position with the firm of Hertz, Warner? A. Yes, I did.

Q. What position did you take with them? A. I think at the time it was called assistant (167) general counsel or associate general counsel. I don't recall the exact title.

Q. Were you employed by the firm? A. Yes.

Q. On a salary basis? A. Yes.

Q. Could you describe your duties with the firm at that time? A. I was hired to perform the duties of compliance counsel, going to the branch offices, making branch office inspections, checking on reguatory problems as they arose, and things of that nature.

Q. Did there come a time when you were told by Mr. Gusrae that he intended to leave the firm of Hertz, Warner & Company? A. Yes.

Q. When, to the best of your recollection, did that occur? A. Approximately April or May of 1969.

Q. Did you have a conversation with Mr. Gusrae concerning his departure from the firm of Hertz, Warner & Company? A. Yes, I did. He was going to form a new firm, a new brokerage firm, with some other gentlemen, (168) and told he was leaving. The result of the conversation was we both assumed I would be taking over his position as general counsel.

Q. Did Mr. Gusrae tell you that you would assume the position of general counsel of the firm? A. Yes. I believe he had had discussions with Henry Warner. There were really three-way discussions; myself, Henry Warner. The three of us had gotten into conversations that Burt was leaving and I would be taking over his duties.

Q. Up until this discussion of April, '69, as you placed it, did you have discussions with Mr. Hertz and/or Mr. Warner concerning your application for employment with the firm and your duties with the firm? A. Oh, sure, yes. When I first joined in November of '68, when I became employed by the firm, I had conversations with both of them.

Q. Did you know either Mr. Hertz or Mr. Warner prior to joining the brokerage firm? A. Not to my recollection I didn't, no.

Q. Did there come a time when you had discussions with either Mr. Hertz or Mr. Warner or both concerning the possibility of your becoming general counsel to the firm of Hertz, Warner & Company? (169) A. Yes.

Q. When, to the best of your recollection, did that conversation or those conversations take place? A. Approximately mid-May of 1969.

Q. With whom did you speak? A. I had discussions with, again, Burt Gusrae and independently with Henry Warner.

Q. And could you tell us what you said to either Mr. Warner or Mr. Gusrae? A. Well, there were a number of conversations. Basically, the conversation between Mr. Warner and myself was that Burt was leaving, that I would be taking over as general counsel to the firm. I said if I was taking over as general counsel of the firm I would like to have the authority that went with the responsibility. We discussed a number of varying ways to get that authority. As a result of the conversation, it was suggested that I become a partner of the firm.

Q. And can you place this conversation in point of time? A. Approximately May 15th, mid-May, 1969.

Q. And it was with Mr. Warner? A. Yes.

Q. Did, during the course of this conversation (170) or series of conversations at that time, the more serious discussions concerning potential partnership in the firm ensue? A. Yes.

Q. And do you recall, if anything, you said to Mr. Warner concerning your potential partnership? A. We had discussions regarding my salary, regarding what my percentage of the profits would be, what my percentage of the losses would be. We had discussions what the firm was doing, how it was doing.

Q. Could we get a little more specific? A. Yes.

Q. Did Mr. Warner say anything to you concerning your salary? A. At the time I think I was making $16,000 a year and I had had a discussion with Burt Gusrae regarding what I thought my salary should be and what his was. Then I had a discussion with Henry. It was more or less that my salary—

Q. "Henry" is Henry Warner? A. Yes—that my salary would be increased to $20,000 a year, and that I would receive the same participation in the profits and losses of the firm as Burt Gusrae had had.

(171) Q. Did you know what participation Mr. Gusrae had had as a partner in the firm? A. Yes.

Q. What was that participation? A. One-half of 1 per cent of the profits and approximately .8 or .9 per cent of the losses.

Q. What did you say to Mr. Warner? A. I was somewhat elated to become a partner of a member firm, and I asked him how much—in the discussion of the half a point profit, which probably was some time in early June or late May, 1969, I don't remember who asked whom what, but the nature of the conversation was that the half a point had been worth in 1968 some 12½ thousand dollars

to Burt Gusrae, based upon the fact that the firm had made, I think, $2½ million that year net profit, and there was no reason to believe that my half a point would not be worth the same amount.

Q. Mr. Warner told you that? A. Yes, in the general course of conversation.

We had a discussion regarding bonuses and Christmas bonuses had been given. In other words, it was a matter of, yes, I was only making $20,000 a year salary, but the other benefits, including this half (172) a point profit, bonuses and everything else, it would be substantially more.

Q. Did Mr. Warner tell you anything about the current financial condition of Hertz, Warner at the time of these discussions concerning your potential partnership? A. Just in general terms he mentioned the firm was doing well and that he did not have—well, the year ended in June, June 30, 1969. He did not have the year-end financials, so he couldn't tell me how the firm had done on a year-end basis.

Q. Let me ask you this, Mr. Held: In the course of your partnership discussions with Mr. Warner, did you request that he provide you with financial statements concerning the company's present financial operations? A. Once, yes.

Q. And what did Mr. Warner say to you? A. That he didn't have them.

Q. When did you make this request? A. Approximately early June, 1969. I had had a discussion with my father-in-law, who is an accountant, whom I'm very close to, and he understood what the situation was and asked me if I knew what their present financial condition was. I related to him that it was (173) a $2½ million profit the year before, and in general I related the conversation

I had with Mr. Warner, and he suggested I get a financial statement.

In the course of another conversation I asked Mr. Warner for a financial statement. I wouldn't say it was a formal request in that I said I must see a financial statement before I do anything else; I didn't put it that way. It was a matter of what are the figures on the firm. And the answer was that they weren't available at that time. The only figures that were available were the year-end '68 figures.

Q. Did he in words or substance indicate to you that the firm had incurred losses for the period January 1, 1969 through June, 1969, at the time of these conversations? A. Absolutely not.

Q. Mr. Held, could you describe for the court as best you can the operations of the firm and the conditions of the firm as you perceived them at the time of this conversation with Mr. Warner. A. It was, to say the least, incredibly busy. We had a large staff, we had 13 or 14 branch offices—wait a minute. You asked me at the time I had the discussion about the partnership?

(174) Q. Yes. A. We had 12, 13 branch offices. Things were extremely hectic. A lot of business was being written. There were underwritings going on, there were constant conferences daily on new business, retail businesses, new institutional businesses, how to expand the institutional department. There was some construction being done at 2 Broadway.

Q. There was expansion construction? A. I don't know if it was expansion in the sense that that's a funny word. I had moved out of one office and a new office was being constructed at 2 Broadway. There was construction being done at 42 Broadway, which was another office. They were

talking about converting a small branch office and consolidating the out-of-state branches and selling the out-of-state branches and consolidating the operation into New York. They had become a little spread out at that point.

Q. One thing that I neglected to go over earlier, during this time, from the time you joined the firm, was the firm of Hertz, Warner & Company represented by outside counsel? A. Yes.

Q. What firm represented Hertz, Warner? (175) A. I think they were represented by Willkie, Farr & Gallagher, and a firm in Washington, Chapin, DiSalle & Friedman, I think.

Q. Well, in or about May or June of 1969, Mr. Held, did you in words or substance tell Mr. Warner or Mr. Hertz that you would accept the partnership proposal that was put to you? A. I don't know if it was really an expressed acceptance. It was like—I don't think I ever asked my wife to marry me. We just got married. It's like we just did it. I don't know if I ever said yes, I do accept, formally. I don't think that ever really happened.

The Court: Same emotional quality?
Go ahead, you don't have to answer.

Q. Did you have any conversations at or about May or June with Mr. Hertz concerning your potential partnership with the firm of Hertz, Warner & Company? A. I'm sure I did, but my main dealings were with Henry Warner.

Q. After this conversation did there come a time when you began to prepare a draft of the proposed 1969 Hertz, Warner & Company articles of partnership? A. I don't recall whether it was after that or (176) before that. It

was around that time Burt Gusrae had already stated he was leaving and Henry Warner asked me to prepare the partnership agreement, inasmuch as Burt was leaving, so the job fell to me. I believe it was approximately June of '69.

Q. And, Mr. Held, in the course of your responsibilities to draft the proposed agreement did you have discussions with the other proposed partners of the firm concerning the terms of the agreement? A. Yes.

Q. With whom did you speak? A. I guess at one point or another I spoke to everybody. I spoke with Paul Cohn—

Q. Well, I think I would like to be a little bit more specific in going back to an area. With respect to the information and the terms of the partnership, did you obtain that information from any one source or many sources within the firm. A. Basically from one source, and that was Henry Warner.

Q. And what information came from Mr. Warner concerning the terms and conditions of the partnership agreement. A. Well, I had the 1968 partnership agreement (177) which I was using as a draft. We discussed just about every point of it.

Q. You and Mr. Warner did? A. Myself and Mr. Warner, regarding the seats, regarding valuations, regarding what partners, whether the general or limited, were leaving, when they had left, which partners were coming in, new partners, how much capital they were going to contribute, what percentages they would have, language regarding profits and losses.

Q. Was this one conference with Mr. Warner? A. No. It was over the course of June, July, August, September, October and parts of November.

Q. The drafting of the proposed agreement then was somewhat of an on-going process over a series of months, is that correct? A. Absolutely.

Q. During that time you were given information concerning the terms and conditions of the partnership from Mr. Warner? A. Yes.

Q. With respect to the capital contributions and status of Mr. Meyer and Mr. Blau, did you have any conversations with Mr. Warner concerning them? A. I had several. I can only think of one (178) specifically. I don't know when it was but Mr. Warner would supply me with the information or give me information as to their capital contribution.

Q. Mr. Meyer and Mr. Blau? A. Mr. Meyer and Mr. Blau. Mr. Warner was the one who gave me most of the information about any changes that were being—Mr. Hertz occasionally, but Mr. Warner usually.

Q. Specifically what did Mr. Warner tell you about Meyer and Blau and the 1969 partnership agreement?

Mr. Weisberg: Excuse me, your Honor, could we have a date as to this conversation, approximate date?

The Witness: It was some time between 1/1969 and November 16 or 17, 1969. The partnership agreement was constantly changed. Every time a new draft was done there was another change involved either a limited partner had retired, a new subordinate lender came in, somebody's capital contribution figures changed. Every time there was a draft there had to be a redraft. It became a joke after a while in the sense—not a funny joke but a real hassle after a while.

Q. And during the course of your drafting and redrafting did you have any conversations with Mr. Hertz (179) concerning the status of Mr. Meyer or Mr. Blau under the terms of the proposed 1969 agreement? A. Yes.

Q. Could you relate to us the substance of those conversations? A. I believe it was Mr. Warner who informed me—I don't recall which one but I think it was either Mr. Warner or Mr. Hertz, I think it was Mr. Warner, who informed me that Mr. Blau, Mr. Meyer and Mr. Schiff were to be reclassified in the partnership agreement as limited partners to special limited partners. I then had a conversation with Irving Hertz and I don't remember when this was. It might have been late August, 1969 where Mr. Hertz informed me that he had gotten a memorandum from the attorney for Mr. Arthur Meyer. I don't recall the gentleman's name.

Q. Justin D'Atrie? A. Justin D'Atrie, that's it. Asking for certain revisions but pointing out certain changes to be requested in the partnership agreement or in the draft that had at that point been submitted.

Mr. Hertz gave me a memo. I don't recall how long it was.

Q. Do you recall what you did on receipt of the (180) memo? A. I compared it to the partnership agreement, reviewed it, compared it. I spoke with—I conferred with Jud Best about it, I conferred with Burt Gusrae about it.

Q. Mr. Best was whom? A. He was outside counsel to Hertz, Warner & Company. I conferred with Mr. Gusrae about it.

I told Mr. Hertz as a result of all this comparing that certain points were acceptable, certain points were not acceptable because of the New York Stock Exchange rules or the SEC rules.

Q. Certain points in the Meyer-Blau memorandum? A. Yes, in the Justin D'Atrie memorandum.

Q. I see. Mr. Held, you began, and I cut you off abruptly, to discuss or to testify that Meyer and Blau were to be in a special limited partner category. What made their category as limited partners special or different from other limited partners. A. Well, they controlled or had the great portion of a certain class of stock in an affiliate corporation, Hertz, Warner Affiliate Corporation I think was the name of it, which was a corporation also owned by Hertz, Warner & Company, that did investment banking and things of (181) that nature. Apparently at that time they became very active—when I say "they," I am talking about Mr. Meyer, Mr. Blau, not so much Mr. Schiff but Mr. Meyer and Mr. Blau, they became active—at least the impression I had was they became active in the operations of Hertz, Warner & Company partnership as opposed to the affiliate.

The memo from Mr. D'Atrie confirmed that thought in my mind. When they became special limited partners, the reason they became special limited partners as a category is because they were going to participate in a greater percentage of profits and losses than they would have had they been straight limited partners and subordinated lenders.

Mr. Hertz and I had a conversation wherein we discussed the role of Messrs. Meyer and Blau, the result of which was just a general conversation and discussion between myself, Mr. Hertz, Mr. Warner—I don't know if it was one conversation or many—where I had told them that if Mr. Meyer and Mr. Blau had a control over the partnership, even though classified as special limited partners, they would be general partners.

Joel Held—By Mr. Fitzgerald—Direct

Q. Mr. Held, I am going to show you what has been marked as Plaintiff's Exhibit 1 in evidence and ask (182) you—which is the amended articles of limited partnership for July 1, 1969, and ask you if you can identify that document. A. Yes, this is, if you want to call it, the final draft—I don't know if I would categorize it as a draft. That is the '69 partnership agreement that was sent out to all generals and limiteds to be signed.

Q. Can you recall at or about what time Plaintiff's Exhibit 1 in evidence was sent out to the partners of the firm for their signature? A. Approximately mid-November, November 13th, 17th, somewhere around there, 1969.

Q. Mr. Held, I show you a letter over your signature dated November 21, 1969, and ask you whether or not that is your signature and if you can identify that letter. A. Yes, that is my signature, a copy of my signature. It was November 21, 1969.

Mr. Fitzgerald: Your Honor, I would like to offer Plaintiff's Exhibit 8 for identification in evidence.

The Court: Is there any objection?

Mr. Goldstone: No, your Honor.

Mr. Weisberg: No, your Honor.

(183) (Plaintiff's Exhibit 8 was received in evidence.)

Q. Mr. Held, does Plaintiff's Exhibit 8 in evidence refresh your recollection as to the precise date on which you sent out the proposed partnership agreement for signature? A. Yes, it does.

Q. Is November 21, 1969 that date? A. Yes.

Q. Prior to the date had you sent out any copies or drafts, indeed agreement for signatures? A. Not for signature, no.

Q. To your knowledge had any proposed partner under the terms of that agreement signed any draft of the 1969 agreement? A. No.

Q. Mr. Held, did there come a time when you made a capital contribution to the firm of Hertz, Warner & Company? A. Well, I had had an account—

The Court: Just say yes or no.

You can't say yes or no?

The Witness: I don't think so. I had an account which was moved over to a capital account, so (184) the answer is yes.

Q. You had a trading account with the firm? A. I had a personnal account, yes.

Q. And do you recall at what time that personal account was transferred to a capital under your name? A. Some time in, I think, October or November of 1969.

Q. And prior to that time had you signed any agreement evidencing your intention to enter into the partnership? A. No.

Q. Did there come a time when you did sign the proposed 1969 partnership agreement? A. Yes.

Q. Could you give us a date, to the best of your recollection? A. Approximately late December, '72 or early January, '73—I'm sorry, late December, '69 or January of '70. Around that time.

Q. And at or about the time you signed—I take it you signed Plaintiff's Exhibit 1 in evidence. Is that correct? A. That's the partnership agreement?

Q. Yes. (185) A. Yes, that's the one.

Q. At or about the time that you signed that agreement did you have any conversations with Mr. Hertz? A. Yes.

Q. Could you relate the substance of that conversation with him? A. Mr. Hertz had asked me on a number of occasions between November 21st, the date the partnership agreement was sent out, who had signed, how many signatures had gotten in, and so on and so forth, had I signed, and I kept saying no; had the other general partners signed, the people who were named as general partners in the partnership agreement signed, and I said some had, some had not. What was the problem, it was asked of me, and I told him everybody was waiting—there was a problem whether Joe Blau and Arthur Meyer would sign. If they would sign, the problem was ther—I'm sorry; if they signed, we would sign. It wasn't a confrontation, I don't mean to categorize it as that; it was just a conversation in general. We were waiting for their signatures. They had a lot of money in the firm and controlled a lot of money in the firm. Without their participation in the firm as partners the firm would be absent some 2½, 3 million dollars, the way I calculated it, and would (186) probably put the firm under.

Q. Did Mr. Hertz tell you anything at that time as to whether Meyer and Blau signed? A. The day I signed I had asked Mr. Hertz if Mr. Blau and Mr. Meyer had signed the agreement. He said they had. I then signed it and I went to Paul Cohn, Charles Matthews, and I forget who else, I think it was Charles Matthews, and Bob Sadlier, and got their signatures on the '69 partnership agreement.

Q. Did you have any conversations with Mr. Cohn at the time he signed the proposed '69 agreement? A. Yes.

Q. Would you relate the substance of those conversations? A. He asked me if I had signed, I said why. He asked me how come, and I said because Irving had told me because Joe and Arthur had signed. He said okay and he signed it.

Q. And, again, can you give the court a date on which, to the best of your recollection, Mr. Cohn signed the agreement? A. Same day I did, end of December, beginning of January, '69-70.

Q. Mr. Held, prior to your signing the proposed (187) 1969 agreement did anyone at Hertz, Warner & Company disclose to you that the firm had incurred losses of approximately $1 million during the period January 1, 1969 through June 30, 1969? A. No.

Q. Going back in terms of a chronological approach here, Mr. Held, do you recall a partnership meeting some time in the fall of 1969 attended by the then alleged younger partners in the firm and Mr. Hertz and Mr. Warner? A. Yes.

Q. Do you recall or could you place that meeting for us? A. It was some time in September, I believe, but I don't remember the exact date.

Q. Could it have been later? A. It could have been.

Q. Was it in the late summer to fall of '69? A. It was some time in that period, August, September, October, some time in that period of '69.

Q. Could you relate to us what, in substance, the topic of discussion of that meeting was? A. Basically the topic was one of management and control of Hertz, Warner & Company. Hertz, Warner (188) & Company was set up where there was supposed to be a number of partners and an executive committee. The executive committee being Warner, Hertz, a gentleman by the name of Carney

and a Mr. Saluc, decisions were made regarding the retail business, regarding branch offices and things which we, being the lesser partners in the partnership agreement, were not privy to until they had already been done.

So we had a meeting in Irving Hertz' office and we discussed having the authority and control commensurate with our responsibility as whatever we were doing with the firm, me as counsel, Mr. Cohn and syndicate manager, Mr. Sadlier as back office manager, things of that nature.

We also asked for current profit and loss statements because we had been constantly told that the firm was making money but we never knew how much.

Q. Prior to that meeting which you place in the fall of 1969, had you received any profit and loss summaries regarding the operations of the firm? A. I don't believe so, no.

Q. And what did Mr. Hertz or Mr. Warner say in response to the young partners' request for profit and loss summaries at this meeting? A. I don't remember who said it but it was (189) agreed that we would get them on a monthly basis.

Q. And did that fact occur? A. No.

Q. Ever? A. Not to my knowledge, it didn't; at least I certainly don't recall it if it did.

Q. Did there come a time, Mr. Held, in or about January of 1970 that you learned of the loss of over $1 million in Hertz, Warner's operations for fiscal '69? A. I don't think it was January; I think it was February.

Q. That you learned of the $1 million loss? A. The loss, yes.

Q. Could you describe for me the circumstances under which you first became aware of that loss which was incurred in the prior year? A. An audit had been done

of Hertz, Warner & Company as of November, '69. I think it was November 2, 1969, the results of which were not printed or given to any of the partners or any of the exchanges, whoever was going to get it, until, I would say, late December or January of 1970, December, '69 or January, '70. I don't think I saw that document until late January of 1970.

(190) I reviewed it. I'm not an accountant so I was not all that familiar with the accounting treatments. Some time mid-February Mr. Sadlier came to me and pointed out in the financial statement and entry that indicated that as of a certain date in December of—either in December, '68 there was a million dollar profit or 1.2 million profit, or showing there was a million-dollar loss over that period of six months I don't know how it came out. He pointed out several entries about it and it confused and I went to my own counsel and discussed it.

Q. I would like to show you what has been marked as Plaintiff's Exhibit 17 for identification and ask you if you can identify that document, please. A. Without reviewing the whole things, this is appears to be the document.

Q. What does it appeal to be? A. The financial statement of November 2, 1969.

Q. Is that the document that you testified to receiving in or about January of 1970? A. Yes.

Q. Which you reviewed at or about the end of January, 1970? A. Yes.

(191) Mr. Fitzgerald: Your Honor, I offer into evidence as Plaintiff's Exhibit 17 Hertz, Warner & Company answers to financial questionnaire dated November 2, 1969.

* * *

(Plaintiff's Exhibit 17 was received in evidence.)

Q. At the time that it became apparent to you, Mr. Held, that the firm had incurred a loss in fiscal '68-69, did you have any conversations with Mr. Hertz concerning that loss? A. Well, overall the firm did not suffer a loss. There was, I think, a hundred thousand dollar profit for the year end. But that loss of six months, yes, I did (192) have a discussion with him.

Q. In or about the end of January, 1970. A. In February, I believe, February 18th.

Q. As a result of your discovery what did you do? A. I went to see my own attorneys.

Q. Did you go with anyone else from the firm? A. Yes, I went with Paul Cohn.

Q. What attorneys did you go to see? A. Javits & Javits.

Q. As a result of that visit to Javits & Javits do you then recall having a conversation with Mr. Hertz concerning the results of fiscal '68-69? A. Yes.

Q. Do you recall the time of that conversation? A. Approximately February 18, 1970.

Q. And what did you say to Mr. Hertz? A. I told him I was resigning from the firm.

Q. And what did Mr. Hertz say to you? A. He asked me why. I told him because I felt that I had been lied to in a number of areas and most particularly with regard to the financial statement.

Mr. Hertz told me—asked me to stay, told me not to leave, that the firm was going through a tremendous transitional period from retail to institutional and (193) they need me, this, that and the other thing. He told me that if I was concerned about losing money, I shouldn't be

concerned about losing money because he guaranteed that I would not lose any money.

Q. In this conversation? A. In this conversation, yes.

Q. Did you stay on? A. Yes, I did. He also said if I left other people would leave and the firm would go under and I would be ruined in the industry. I got frightened and I said yes.

Q. And this conversation, when do you place it? A. February 18, 1969 or thereabouts, give or take a day.

Q. Going back again—I am sorry to keep doing this—A. Did I say '69? I meant '70.

Q. Subsequent to this conversation in February, 1970 you recall having a conversation shortly thereafter with Mr. Hertz concerning Mr. Warner's capital account?

* * *

(195) Q. Back to the chronology again, Mr. Held, did there come a time shortly after your conversation with Mr. Hertz in February, 1970 that you discussed Mr. Warner's capital account? A. Yes.

Q. Would you relate to the court the substance of that conversation, please? A. Some time in April of 1970 Mr. Sadlier came over to my office and asked me did I know that some securities—did I know that Henry Warner had delivered some $200,000 (196) or $250,000 of securities from his account to some bank in New Jersey, 2000 shares of General-something-or-other. I forget what stock it was, but well in excess of $200,000 worth of securities free to a bank in New Jersey. By free I mean not against payment, they were just delivered out.

Q. Your recollection is that this conversation occurred in April, 1970. A. Late March, beginning of April, I think, of 1970.

Q. All right. And I asked Mr. Sadlier if he had spoken to Mr. Hertz about it. He said no, he wanted to speak to me first. We went over to see Mr. Hertz about it. Bob Sadlier gave him all the facts and all the back-up documents to show the movement of securities. Mr. Hertz got rather upset. He asked me to do a number of different things to retrieve the securities.

I told him I wanted to discuss it with Jud Best. I did discuss it with Jud Best. Eventually a decision was reached to write a letter to Henry Warner demanding return of the securities and if that letter had no effect, that Jud Best would follow up with a letter and then go into litigation or the district attorney or whatever.

(197) Q. I show you a letter on the letterhead of Hertz, Warner & Company, which has been marked as Plaintiff's Exhibit 12 for identification, and ask you if you can identify that letter, please. A. Yes, that's my letter. That's the letter I wrote to Henry Warner.

Q. Concerning— A. Concerning the stock that had been transferred from his account to a bank in New Jersey.

Mr. Fitzgerald: Your Honor, I offer into evidence Plaintiff's Exhibit 12 for identification.

Mr. Weisberg: No objection, your Honor, subject to connection.

(Plaintiff's Exhibit 12 was received in evidence.)

Q. Mr. Held, I would ask you to read to yourself the first paragraph of Plaintiff's Exhibit 12 in evidence, please. A. (Witness examines document.)

Q. Does that refresh your recollection as to when you had the conversation with Mr. Hertz concerning the movement in Mr. Warner's capital account? A. Not the exact

day, but it was some time in the latter part of April, 1970 when we had some discussions with (198) Mr. Warner about it.

Q. You did discuss the capital account with Mr. Warner? A. Twice, yes.

Q. And what did you say to Mr. Warner? A. If I'm not mistaken, the letter refers to two meetings; one on April 30th and one on May 4th. I think it was in Irving Hertz' office, between myself, Irving Hertz, Henry Warner, I think perhaps Jud Best was there. In any event, Mr. Hertz asking Mr. Warner why the securities were moved; I asked for a full written explanation as to why the securities were in fact moved from the firm, from his account in the firm to the bank in New Jersey.

Q. What did Mr. Warner say? A. Mr. Warner said that the reason they were moved is because they were not his securities, they belonged to his wife and he was just returning them to his wife.

Q. Did there come a time, Mr. Held, when you were advised of a decision by Hertz, Warner to liquidate the firm? A. Yes.

Q. Do you recall on or about what date you were advised of that fact? (199) A. I think it was May 6th, May 7th, the end of April, the beginning of May, 1969. I don't recall the exact date.

Q. I see.

The Court: Do you mean '69?

The Witness: I am sorry, 1970. I'm sorry.

Q. It could have occurred in late April or early May? A. Yes.

Q. Not later than that, is that your testimony? A. That's correct, not later than that.

Q. Could you describe the facts and circumstances surrounding your being advised of that fact of liquidation? A. We had been having several meetings through April—March and April of 1970 regarding—

Q. Who was having meetings? A. Mr. Hertz, Mr. Warner, myself, Mr. Sadlier, Mr. Cohn, Mr. Matthews, Marvin Furst, who was the accountant, and other people. I don't remember who else might have been there.

Q. Concerning what subject? A. Just concerning the general paring down of (200) overhead in the firm, paring down the back office staff. We were now out of the retail business as such in any kind of big way and the overhead was still there and we were cutting down on employees. Budget meetings: how much this department was allowed, that department was allowed, and so on; constantly being encouraged that the institutional business was picking up, that the firm was going to do all right, this, that and the other. Then all of a sudden, whenever the date was, and I don't remember the exact date, we came into a meeting, and I think Marvin Furst was there, Irving was there and Henry Warner was there, and a couple of other people that I just mentioned, and we were told that the firm was liquidating.

Q. I beg your pardon? A. We were told that the firm was liquidating.

Just prior to that time we had had discussions regarding mergers with other member firms and things of that nature.

Q. Had you taken part in the decision to liquidate the firm? A. In the decision? Absolutely not.

Q. Going back to Plaintiff's Exhibit 1 in evidence, which is the proposed '69 partnership agreement, Mr. Held, would you know if this particular agreement was (201)

ever filed with the New York Stock Exchange? A. To the best of my knowledge, it was not.

Q. Mr. Held, I am going to show you a series of correspondence between the New York Stock Exchange and the firm of Hertz, Warner which has been marked as Plaintiff's Exhibit 9 for identification, 10 for identification, and I would like you to look at these respective exhibits and I would ask you if you could identify them, please. A. Okay.

Q. Mr. Held, can you identify Plaintiff's Exhibit 9 for identification? A. Yes. That was the letter I received from the New York Stock Exchange asking for an executed copy of the '69 partnership agreement.

Q. Can you identify Plaintiff's Exhibit 10 for identification, please? A. Same request from the New York Stock Exchange, April 23, 1970.

Q. Same request meaning what? A. They wanted a fully executed copy of the partnership agreement.

Q. To be filed? A. To be filed.

(202) Q. Can you identify Plaintiff's Exhibit 11 for identification? A. That's a letter dated July 8, 1970, from me to the stock exchange, sending them various copies of signed pages but informing them that there was no fully executed partnership agreement.

Mr. Fitzgerald: Your Honor, I offer into evidence Plaintiff's Exhibits 9, 10 and 11 for identification.

Mr. Weisberg: I would like to ask the witness one question with regard to these documents.

Voir Dire Examination by Mr. Weisberg:

Q. Mr. Held, Plaintiff's Exhibit 10, the second letter from the stock exchange, is dated April 23, 1970. Your letter to the stock exchange is dated July 8, 1970. Was there any letter in between these two letters? A. I don't remember whether there were letters but there was certainly a tremendous amount of conversation between myself and the stock exchange.

Q. In other words, you answered the April 23rd letter—

The Court: He said he doesn't remember if there were any letters. He has answered that. What (203) is your next question?

Mr. Weisberg: That's all.

Mr. Fitzgerald: Any objection?

Mr. Weisberg: No objection.

(Plaintiff's Exhibits 9, 10, 11 are received in evidence.)

* * *

(204) *Direct examination by Mr. Fitzgerald* (Continued):

Q. Mr. Held, did there come a time when you had discussions with Mr. Hertz concerning the 2000 shares of AT&T common stock which represented Mr. Cohn's, Paul Cohn's, capital in the firm of Hertz, Warner & Company? A. Yes.

Q. Can you recall, to the best of your recollection, when you had a discussion with Mr. Hertz? A. The first discussion, or one of the first discussions, was about probably the beginning of October of 1969. Mr. Hertz, informed me that Mr. Cohn would be putting in 2000 shares of Telephone to the firm as his capital (205) contribution and I had to draw a loan agreement and I should pattern it after a different loan agreement that had already been drawn.

Q. Which loan agreement did he ask you to pattern it after? A. There was a loan agreement that had been drawn a couple of months earlier between, I believe it was, Irving Hertz and his wife. In any event, I drafted the agreement.

Q. Did you pattern it after the loan agreement between Mr. Hertz and Mrs. Marilyn Hertz? A. Yes. As a matter of fact, I think the only changes were the names and the amounts of the securities.

Q. I see. A. I drafted the loan agreement. I gave it to Paul Cohn. Some time in mid-October, 1969, Mr. Cohn delivered the 2000 shares of—well, I received a corporate authorization from Peerless Mills, a stock power signed by Peerless Mills and guaranteed by a bank, and a copy or the original of the loan agreement. I don't remember whether I saw the stock certificates or not.

Then I turned the documents over to a gentleman by the name of Charles Walsh, who was the transfer clerk in the back office.

(206) Q. At Hertz, Warner? A. At Hertz, Warner & Company, and told him to transfer the stock into the name of Hertz, Warner & Company. It was an old certificate in the name of Peerless Mills. I think it was 1954, '56 or something like that. Very old.

About a week or two later—I am not too sure of the time sequence, but about a week or two later Mr. Walsh called me or came into my office and said he couldn't get a transfer because he had either lost the documents or he couldn't find the corporate authorization, stock power and all this other stuff.

I then spoke with Mr. Paul Cohn, probably by this time into November of 1969, and requested duplicate originals of the documents he had already given me. He supplied them to me and I gave them again to Charles Walsh. To

the best of my knowledge, the stock certificate was transferred.

Q. Into the name of Hertz, Warner? A. Into the name of Hertz, Warner.

Q. And then at that time you had nothing further to do with respect to those securities? A. Nothing.

Q. I see. Did there come a time again when you (207) had a conversation with Mr. Hertz concerning the 2000 shares of AT&T stock contributed by Mr. Cohn? A. Yes.

Q. When was that, Mr. Held? A. I don't recall exactly but it would have been around the end of May, beginning of June of 1970.

> Mr. Goldstone: Your Honor, just for clarification, I think the court understands that we have stipulated these are different securities, AT&T securities, but not the capital contribution made by Paul Cohn.

Q. Could your subsequent conversation have been as late as September of 1970 with Mr. Hertz concerning the 2000 shares of AT&T stock? A. There was conversations in September, yes. Right, there was as late as September, correct. It was not May or June.

Q. It was not in May or June? A. No, it was September, 1970.

Q. Could you relate to the court what the substance of those conversations was? A. Irving Hertz called me--I was then no longer with Hertz, Warner & Company. He called me and he asked me did I have copies of the documents that Paul Cohn had (208) given to the firm or did I have any originals of the corporate resolution and the stock power and so on.

Q. The documents that were delivered with the securities originally? A. Yes.

Q. I see. A. I told him I did not. He asked me why, and I told him they had all been given to Charley Walsh. I asked him what the problem was and he said the stock certificate had never been transported into the name of Hertz, Warner & Company out of the name of Peerless Mills.

Mr. Hertz accused me of in effect losing the documents. I tried to set him straight on that.

Q. Were you directed then by Hr. Hertz to do anything? A. Well, a couple of days later he called me back and he apologized because he realized now that the new stock in the name of Peerless Mills—apparently there had been a transfer from Hertz, Warner back to Peerless Mills—was dated some time in 1970, therefore evidencing the fact that I in fact had given him the documents in question.

He asked me to meet with he and Bob Sadlier, which I did. We discussed the problem. The question was what to about it. I think Bob Sadlier suggested (209) a letter of correction to AT&T sending back the new Peerless Mills certificate and asking for it to be retransferred into the name of Hertz, Warner & Company.

I subsequently had conversations with a woman at the Telephone—AT&T. I don't remember her name. Clundt, or something to that effect.

Q. Right. A. And as the result of a number of conversation was that they wanted a letter of indemnification. I related that to Messrs. Hertz and Sadlier. They prepared them and hand delivered them to me and I gave the Peerless certificate to the Telephone Company office on Broadway, I think it was. I came back an hour and a half later and picked up the new certificate in Hertz, Warner's name.

Q. I show you what has been marked Plaintiff's Exhibits 13 and 14 for identification and ask you if you can identify those documents, please. A. Document No. 13 is

a copy of the letter of correction that was given to the Telephone Company on the 2000 shares. Exhibit 14 is my letter of September 15, 1970 to American Telephone & Telegraph Company requesting them to make the necessary change, enclosing a copy of the letter of correction and asking them to deliver the stock certificate (210) to me.

Mr. Fitzgerald: Your Honor, Plaintiff offers Exhibits 13 and 14 in evidence.

Mr. Goldstone: No objection.

Mr. Weisberg: We have no objection.

(Plaintiff's Exhibits 13 and 14 were received in evidence.)

Q. Mr. Held, I am going to show you what has been marked as Plaintiff's Exhibit 15 for identification and ask you if you can identify that particular document. A. Exhibit 15 is my letter of September 15, 1972 to the Telephone Company asking them for copies of their documents relating to the transfer of the 2000 shares.

Q. I also show you at this time a document which has been marked Plaintiff's Exhibit 16 for identification and ask you if you can identify that particular document. A. 16 is my letter of December 30, 1972 to the Telephone Company. I'm not quite sure why it was written.

Mr. Fitzgerald: Your Honor, plaintiff offers Exhibits 15 and 16 into evidence.

Mr. Goldstone: No objection.

Mr. Weisberg: No objection.

(211) (Plaintiff's Exhibits 15 and 16 were received in evidence.)

Mr. Genovese: Your Honor, we have concluded the direct examination of Mr. Held subject to the

open matter of the letter of December 29th, which I refer to, which counsel informs me they don't have with them today.

* * *

(213) *Direct examination continued by Mr. Fitzgerald:*

Q. Can you recall now which of the partners or the proposed partners of Hertz, Warner & Company actually signed the July 1, 1969 agreement? A. Not really, no.

Q. Mr. Held, I show you a letter bearing your signature which has been marked as Plaintiff's Exhibit 21 for identification and I ask you if you can identify that and whether or not it refreshes your recollection as to partnership signatures. (214) A. Exhibit 21 is a letter I wrote on December 29, 1970 to an Arthur Winard, giving him certain information he requested, including a list of those indicated in the '69 agreement as partners and check marks next to their names as having signed.

Mr. Fitzgerald: Your Honor, plaintiff offers Exhibit 21 for identification in evidence.

Mr. Weisberg: We have no objection.

(Plaintiff's Exhibit 21 is received in evidence.)

Q. Mr. Held, referring to Plaintiff's Exhibit 21 in evidence, can you tell the court which proposed partners of the firm did not sign the July, 1961 partnership agreement? A. Mr. Sheldon did not sign, and there are, oh, two or three others who were in the partnership agreement as general partners but by January 1, '70 had already been released as partners. They did not sign either. They were not included in this list.

Joel Held—By Mr. Weisberg—Cross

Q. Could you name them? A. A Mr. Saluc, Mr. Martin Gilman didn't sign.

Q. How about Mr. Kramer? A. Mr. Kramer did not sign.

Q. Any other generals to your best recollection? (215) A. Let me see the partnership agreement.

Q. Here is Plaintiff's Exhibit 1, Mr. Held, in evidence. A. Those were the only three.

Q. General partners that did not sign? A. That's correct.

Q. Are there any other partners that did not sign the proposed '69 agreement? A. Mr. Joseph Blau did not sign it—I never received a signed copy from him, anyhow. I never received a signed partnership agreement from Mr. Meyer, from Mr. Schiff, and the others are listed in Exhibit 21, Mitchell Alfus, Wendy Alfus, and J. Blau, L. Blau, Mr. Feldesman, Mr. Kalman, Mr. Levine, A. Meyer, S. Meyer, Mr. Rothhauser, Mr. Scheinman, Mrs. Schiff, Mr. Schiff, who is Ben Schiff, Mr. F. Specter, Mrs. Specter, if I am not mistaken.

Mr. Fitzgerald: No further questions on direct examination, your Honor.

* * *

Cross-examination by Mr. Weisberg:

Q. Mr. Held, would you recall when you commenced your employment with Hertz, Warner & Company? (216) A. Beginning of November, 1968.

Q. November of 1968? A. That's correct.

Q. And you were there for approximately five or six months before you heard of Burt Gusrae leaving, is that correct? A. That's about correct, yes.

Q. During the time that you were there these five or six months what were your duties at Hertz, Warner? A. As I testified, I was in charge of compliance, I was in charge of reviewing the branch offices from a compliance standpoint, looking for regulatory problems, things of that nature.

Q. As part of your job, was it your duty to check security loan agreements and other documents that came into the company? A. No. That was left pretty much to Burt Gusrae.

Q. When did you commence discussions with—first of all, Burt Gusrae was a general partner, was he not? A. Yes.

Q. And he had the title of—what was his title? (217) A. I think it was general counsel.

Q. And he recommended to you to succeed him in that position when he left, did he not? A. I honestly don't know. I assume he did.

Q. Now, when you entered into negotiations with Mr. Henry Warner with regard to you becoming a partner, did the question come up about the fact that general counsel was traditionally a general partnership position in the firm? A. I don't recall that discussion.

Q. Do you know how they picked the general partners, what the qualifications for a general partner were with the firm? A. No.

Q. Well— A. At the time, yes. A. No.

Q. Thinking over the general partners who were there prior to your becoming a general partner and who were admitted with you, would you say these were people in positions with performance of the firm and they were offered the general partnerships on the basis of merit? A. They were persons in positions of performance as

such; syndicate department, head of the legal department, (218) head of the back office. That's about it, I guess.

Q. Would that be a fair statement then, that the persons in authority of Hertz, Warner were the ones that were offered the general partnerships? A. Not really. There were persons in other departments—I'm trying to remember whether the controller, for instance, I don't recall if he was offered a partnership or became a partner or was not a partner. He was in charge of that area. I just don't recall.

Q. So you can't say whether it's a fair statement or not? A. No.

Q. Do you know whether the general partners were chosen on the basis of their capital contributions? A. Like I say, I don't know why they were chosen.

Q. Do you know they were not chosen based on the amount of capital they could contribute to the firm? A. I assume that is true, that they were not chosen on how much they could contribute to the firm.

Q. Now, in your discussions prior to becoming a partner of Hertz, Warner, was any mention made of your capital contribution to the firm? (219) A. Prior to July 1st?

Q. Yes. A. Yes

Q. And was it agreed upon at that time as to how much of a capital contribution you would make? A. I think so, yes.

Q. And what was the amount of that? A. $5000.

Q. And did there come a time when you made that capital contribution? A. As I said, I had an account there which became a capital account. As of July 1st that account had in excess of $5000 in it.

Q. When did it become a capital account? A. Well, it was transferred into a capital account I think in October of 1969, October, November.

Joel Held—By Mr. Weisberg—Cross

Q. How much money was in the account at that time? A. I don't know. In excess of $5000, between stock and cash.

Q. Did there come a time when the amount in that capital account went below $5000? A. Yes.

Q. And when was that? (220) A. I couldn't peg the date. There were securities in the account which decreased in value. I really don't know but there was a time when it went below 5000. Wait a minute. I'm trying to remember now. When it went below 5000 it might have been well after January 1, 1970.

Q. January, '71, you mean? A. No, January, '70.

Mr. Weisberg: May I see the last exhibit, the letter of December 29th?

Mr. Fitzgerald: Yes.

Q. I show you Plaintiff's Exhibit 21 in evidence and ask you if by looking at this document you can tell how much of a deficit there was in your capital account as of December 21, 1970. A. How much of a deficit there was?

Q. Yes. A. According to the letter the deficit was $3492.69.

Q. Now, you testified a few minutes ago that you were going to receive a $20,000 salary as a general partner and get 1/2 of 1 per cent of the profits, is that correct? A. That's correct.

(221) Q. I'd like to show you Plaintiff's Exhibit 1 and ask you, by looking at this partnership agreement would it refresh your recollection as to the amount of points that you actually did receive. A. Well, there was a change. At the inception it was a half of 1 per cent of the profits and .9 per cent of the losses. Then I think—which was one of the problems why the partnership agreement was not

completed and sent out until November of 1969. There was constant changing occurring in it. I think in September or October of 1969, I don't remember exactly when, there was a change, and my profit participation was increased to 1 per cent.

Q. So in other words, is that the agreement, Plaintiff's Exhibit 1, that you signed? A. Yes, sir.

Q. That is the final draft of the partnership agreement? A. Yes, it is. There was to be an amendment because certain partners had come out—certain people had come out of this agreement by the time it was signed, by the time it was sent out to everybody to be signed.

Q. Is it a fair statement that the number of partners in this partnership changed constantly, that every month (222) or two there would be somebody coming in or somebody leaving? A. There were always deletions and additions. I don't know many additions were put there with always deletions of people.

Q. And what was the date that you signed this partnership agreement? A. As I just testified, I don't know the exact date but I think it was the end of December or the beginning of January, '69-70.

Q. Mr. Held, as a general partner of the firm of Hertz, Warner did you have to make application to the New York Stock Exchange as an allied member? A. I did make application to the New York Stock Exchange, yes, sir.

Q. When did you make such an application? A. I don't remember. July, June; June or July of 1969.

Q. Wasn't it possibly in May of 1969? A. Could have been.

Q. And did you attend at the New York Stock Exchange and take an examination prior to becoming an allied member? A. Yes, I did.

(223) Q. And was your name— A. May not have. I may have been conditionally approved. I don't remember.

Q. And was your name posted in the New York Stock Exchange bulletin as a new allied member for two weeks in accordance with their regulations? A. Yes, as far as I recall, it was.

Q. And when did you actually assume the title of general partner of Hertz, Warner? A. I think I assumed the title of general counsel on July 1st. I don't recall whether I ever assumed the title general partner as a title. I just don't recall.

Q. When did your compensation, remuneration, change from a salary to a draw at Hertz, Warner? A. I don't know if it ever did.

Q. Were you paid the same amount as a partner as you were as an employee? A. My salary was increased from 16,000 to 20,000 on or about July 1, '69. But I treated it as a salary because Internal Revenue treated it as a salary and I got audited in 1970 and I had to pay additional taxes on the grounds it was a salary and not a draw or a loss or anything else.

(224) Mr. Weisberg: I move that be stricken, your Honor, as not responsive.

Q. When you were paid did it say on your pay check or in any way that this was a draw, a partner's draw? A. I don't remember.

Q. Did you have cards printed up that said general partner on them or in any way indicated that you were a general partner of Hertz, Warner? A. I don't think so. I think I had cards drawn up, general counsel. I don't remember. I don't think so.

Q. Did you attend partnership meetings after July 1, 1969? A. Yes.

Q. Now, you have stated that certain financial information was not made available to you in May or June of 1969. Is that correct? A. That's correct.

Q. Whom did you ask for that financial information, Mr. Warner. A. ? ? ? ? ? ? ? ?

Q. Did Mr. Warner generally keep the financial information of the partnership? A. I don't really know who kept it. I assumed he did. He was a member of the executive committee and (225) I assumed he knew what the financial condition of the company was.

Q. Did he refuse to tell you what the financial condition of the company was? A. No. He said he couldn't because he didn't have a year-end financial statement. It wasn't due until the end of June of 1969.

Q. And after June 30, 1969, which was the close of the fiscal year, did you then ask or request that you be shown a copy of the year-end financial statement? A. Yes.

Q. Of whom did you request that information? A. Mr. Warner and Mr. Hertz on several occasions.

Q. And did they say that you could not have that information? A. They didn't have it. They said they didn't have it. I was asking for it. I had been asked by limited partners, past general partners who were I guess to participate in that year-end money, and they kept asking me how much did we make, and I kept going back and saying I am getting bugged from these people and I need an answer for them. That was the general basis of the conversation.

Q. Do you know or were you acquainted with Robert (226) Sadlier? A. Yes.

Q. What was Robert Sadlier's position with Hertz, Warner? A. He was in charge of the back office.

Q. And what were his duties in addition to taking care of the cage, I believe it is called? A. Yes.

Q. Did he have any other duties? A. I suppose you would call him operations manager.

Q. As operations manager did he have anything to do with the financial affairs of the corporation—of the partnership, rather? A. Financial affairs?

Q. Isn't it a fact, Mr. Held, that he prepared the profit and loss statements for the firm? A. I assume Marvin Furst did. I'm sure he prepared internal memoranda and things of that nature and had a general feeling for what his area was doing but I don't know whether he prepared P & L's.

Q. Did you ever ask him for any profit and loss statements or any financial information? A. I'm sure I did.

Q. In other words, you knew that he had the information, (227) and did he ever refuse to give it to you? A. I don't know if I asked him for a statement of the firm because, again, I knew what my area was doing in the sense of how much it cost to run my area, which was the legal area. Bob knew how much it cost to run his area and how much he charged per ticket and things of that nature. I just don't recall—I'm sure I did—I just don't recall asking him, specifically asking him for the financials of the firm.

Q. Are you aware of the fact that as a member firm Hertz, Warner had to file certain financial information with the New York Stock Exchange? A. Yes.

Q. How often did that information have to be filed? A. Well, they had a yearly report that had to be filed.

Q. Any other reports? A. I honestly don't recall at this point.

Q. Is it your testimony that you did not know or do not know at this time that member firms have to file financial statements monthly? A. I think they do now,

and at the time I believe—I just don't recall whether they did at that time or not.

(228) Q. Now, you testified previously about a memorandum that you saw from Justin D'Atrie with regard to the Meyer-Blau group. A. That is correct.

Q. When did you see that memorandum? A. I don't remember.

Q. Was it prior or subsequent to your signing the partnership agreement? A. Prior.

Q. Before you signed the partnership agreement? A. Yes.

Q. Did you ever answer that memorandum? A. I don't recall.

Q. Did you do any work on the partnership agreement in connection with that memorandum? A. Oh, yes. I compared—as I testified, I compared that memorandum to what was already drafted in the partnership agreement, in the proposed partnership agreement, and compared certain things and made notes of them, I guess.

Q. Did you ever have occasion to call Mr. D'Atrie with regard to that memorandum? A. I don't recall. I don't recall speaking to him about it.

Q. You might have? (229) A. I might have, yes.

Q. So, in other words, you were aware as of about December or January, 1969-1970 of the discussions that were taking place between Hertz, Warner and the Meyer-Blau group concerning certain amendments of the partnership agreement? A. I think that was prior to November. I think the Justin D'Atrie memo was pretty early in the game. I think it might have been as early as September or October of 1969.

Q. To your knowledge, did there come a time when negotiations on the partnership agreement between the Meyer-Blau group and Hertz-Warner were suspended? A. I have no idea.

Q. You don't know that they were? A. No.

Q. So to the best of your knowledge, the negotiations were continuing during your term of employment with or your connection with Hertz, Warner, is that correct? A. I know discussions were taking place. I don't know what the discussions were though.

Q. As a matter of fact, after such a discussion would Mr. Hertz or Mr. Warner, if they were conducting the discussions, ask you to make a change in the partnership (230) agreement? A. There were many requests that I make many changes in this agreement. Many times I was not aware of the reasons for the changes. It was just that there was to be change or there was conversation between so-and-so and so-and-so, and therefore a change was to be made.

Q. And you were the one who made it? A. Yes.

Q. Did you, Mr. Held, at any time put in the partnership agreement as a stipulation of your becoming a general partner the signature of the Meyer-Blau group was required or that certain capital from the Meyer-Blau group would have to be deposited with the firm?

Mr. Genovese: Objection, your Honor. The agreement is in evidence and it speaks for itself.

Q. Did such a stipulation appear on any of the prior drafts to the one that is now in evidence? A. Stipulation saying what now?

Q. Saying, first, that the signature of the members of the Meyer-Blau group or any member of the Meyer-Blau group was required or a condition to your signing and accepting the partnership agreement. A. I don't recall any such stipulation.

Joel Held—By Mr. Weisberg—Cross

Q. Was there any stipulation placed in the agreement (231) to the effect that unless the capital as reflected in the 19—any prior draft of this 1969 agreement which was supposed to be paid by the Meyer-Blau group were deposited with the firm, placed into capital, that you would not or any other partner would not sign this agreement?

Mr. Genovese: Objection on the same ground, your Honor.

The Court: He is talking about the draft so I will allow it.

Mr. Weisberg: It is the prior draft.

Mr. Genovese: In any event, I believe the drafts would be merged into the final agreement in any event. There is no testimony—well, I believe they become merged into the final document.

The Court: But this may bear on the question whether it was in fact understood in any way that this was a condition and it may bear ultimately on the question that you have prevented as to whether any misrepresentations were made, especially when you are dealing with a lawyer.

You may answer.

A. I don't recall any such stipulation, any written stipulation, in the agreement. There were certainly discussions about it but I don't recall any written (232) stipulation in the agreement. There were certainly discussions about it but I don't recall any written stipulation to that effect.

Q. Did you know in December of 1969 how much money the Meyer-Blau group had contributed to the capital of Hertz, Warner?

Mr. Genovese: Objection. As of what time?

Mr. Weisberg: I said December.

Mr. Genovese: Under what agreement they contributed, under the '68 agreement, '69 agreement?

Mr. Weisberg: My question is solely did he know whether there was money paid as a capital contribution to Hertz, Warner by this Meyer-Blau group as of December or January, 1970.

The Court: In other words, whether at that time there was capital in the firm of this group and what its amount was?

Mr. Weisberg: Yes.

The Court: You may answer, if you know.

A. I knew they had some money in. I don't recall the exact amount. I don't know if I had discussions regarding the exact amount.

Q. Didn't you testify on direct, Mr. Held, that their money accounted for two or three million dollars? (233) Was that your testimony under direct?

Mr. Genovese: Objection, your Honor. That's the point I was making. What Mr. Held testified to on direct was that their money was supposed to make up 2.8 to 3 million under the '69 agreement.

The Court: Well, let's let the record tell us what he said on direct. Ask him some other question.

Q. Mr. Held, I would like to show you this agreement dated as of the 1st day of July, 1968, and ask you if you ever have seen this before. A. I don't think I ever saw this one. I have seen a document which purported to be the agreement of July 1, 1968, but it had signatures in it and this one does not.

Q. You can't tell us whether that is in fact a true copy of the 1968 agreement, is that correct? A. No, I cannot.

Q. Looking at the page that shows the contributions of the limited partners, do you know whether or not that list accurately reflects the amount contributed by the Meyer-Blau group in or about 1968? A. I have no idea. I didn't join until the latter part of '68.

Q. As a matter of fact, Mr. Held, didn't you use (234) this agreement as the basis for drawing that agreement? A. Yes.

Q. And didn't you have occasion to work with this agreement quite thoroughly? A. Yes.

Q. But you still can't identify this as the '68 partnership agreement, is that correct? A. No, because the only one I ever saw was a signed copy or a duplicate signed Xerox copy.

Q. In the absence of such signatures you can't identify it? A. I would have to read it and compare it to something I don't have in front of me, so I couldn't say.

Q. If I tell you that under the 1968 agreement the individuals—by the way, can you identify the Meyer-Blau group by individuals? A. I don't think I could at this point. I will try.

Mr. Weisberg: Isn't that stipulated to?

Mr. Genovese: Stipulation No. 37 in the pretrial order identifies them.

Mr. Weisberg: I withdraw the question.

Q. Weren't you instructed to make certain changes (235) in the contribution of the Meyer-Blau group from what they contributed in 1968 to what they had contributed in 1969? A. I believe I was, yes.

Joel Held—By Mr. Weisberg—Cross

Q. I am going to show you a list which I prepared which is my comparison of the 1968 contributions by the Meyer-Blau group and the 1969 contributions as contained in Plaintiff's Exhibit 1 and ask you if this refreshes your recollection. A. See, I don't know whether they actually ever contributed that money. I assumed they did in 1968, what was reflected in the 1968 partnership agreement, but I had no way of knowing whether that money was physically delivered or not physically delivered.

Q. Let me rephrase the question. Do you know whether or not they were obligated under the 1969 partnership agreement to make the contributions as listed on that list? A. On this list?

Q. Yes. I will show you the 1968 partnership agreement which I have and see if this refreshes your recollection. A. If this document is the 1968 partnership agreement, yes, they were obligated to make the contributions reflected in the agreement.

(236) Mr. Weisberg: May I have this marked for identification?

(Third-Party Defendant's Exhibit G was marked for identification.)

Mr. Weisberg: I would like to offer this in evidence at this time, your Honor, subject to verification that it is an accurate copy of the 1968 partnership agreement which was actually signed by the partners in 1968.

* * *

(238) (Third-Party Defendant's Exhibit H was received in evidence.)

* * *

(240) Q. According to this list the 1968 contribution of the Meyer-Blau group was $1.722 million. Do you know whether or not at any time this $1.722 million was removed from the firm, the capital of the firm? A. First of all, I'm not sure of the total. You have told me the total. Assuming that is the total, I would have no idea if it was removed or not removed.

That's not true either. There were a number of subordinate lenders and limited partners who resigned during the period between June of '69 and January-February of 1970. As a matter of fact, until April of 1970. I don't recall whether they were part of this group. They may very well have been. In this case they would have withdrawn money.

Q. You have no personal knowledge that any individual of the Meyer-Blau group withdrew any of their money that they may have contributed pursuant to that agreement? A. Physically withdrew it?

Q. Yes, physically withdrew it. A. I have no knowledge of that. At least I (241) don't have any recollection of it.

Q. To the best of your recollection, do you know if—by the way, when did you leave the firm of Hertz, Warner? A. June 1, 1970 or May 31, 1970.

Q. Where did you go? A. Lipkin, Gusrae & Held.

Q. Up until June 1, 1970, did you ever receive a letter or any other communication from the Meyer-Blau group withdrawing as limited partners? A. I received several letters from a number of people requesting that they be withdrawn as limited partners.

Q. When were these letters received? A. As I said before, during the period between the end of 1969 through April of 1970.

Q. Can you be more specific about that? A. About the time?

Q. Yes. A. Certainly until the time—up until the time of the end of April, 1970, when Mr. Hertz and Mr. Warner made the decision to cease doing business, I received letters.

When it started? It could have been as (242) early as August, '69, September of '69.

Q. Way prior to the time when you executed the partnership agreement? A. I had received a few letters prior to that time, I believe, yes.

Q. All right. A. But I believe most of those people had subordinated loan agreements which were expiring anyhow as of December 31st, if I am not mistaken.

Q. Do you know whether or not the money reflected on the 1968 partnership agreement was actually left—whether or not it was actually left in the firm and actually used to pay the creditors of the firm? A. I have no idea.

Q. Now, you stated in April of 1970 Robert Sadlier told you about Mr. Warner, told you about Mr. Warner delivery certain securities out of his account, is that correct? A. I believe it was April, yes.

Q. Were you then called into—I believe you testified you wrote letters concerning it and consulted Mr. Best about it and made other inquiries, is that correct? A. Yes.

(243) Q. Again referring to Plaintiff's Exhibit 1 in evidence, would you tell us what Mr. Warner's capital position was as of December 30, 1970? A. Well, you have to understand something about this list. The list is a photostat of a typewritten page which was submitted for the purpose, and the only purpose to Arthur Winard, of showing who had signed and who had not signed. No changes were made in actual capital or deficit. Whether that was accurate at that time I really don't recall.

Q. In other words, you only used that list for the purposes of checking off who had signed as of that date? A. That is correct. It was expeditious for me to copy something and check them off.

Q. You don't know whether or not that list is accurate? A. That is correct, I do not.

Q. All right. Would it be a fair statement, Mr. Held, that you were dissatisfied with the firm in December of 1969? A. That I was dissatisfied?

Q. Yes. Didn't you testify that there were conversations between you and certain of the other, say, (244) the newer partners or junior partners, that you had had certain meetings where you requested financial statements? A. I don't know if I was dissatisfied with the overall firm. I think I was dissatisfied with the lack of management decision-making power that I had or that Paul Cohn had or did not have, I should say, and Charles Matthews and Bob Sadlier, and the letter partners, so to speak.

Q. How old were you at this time? A. Twenty-nine, I think.

Q. How old was Paul Cohn? A. I honestly don't know. Twenty-six, 27, I really don't remember. About the same age.

Q. Bob Sadlier? A. Mid-30s. I don't really know.

Q. Did there come a time when you received any additional points, partnership points, in the firm of Hertz, Warner? A. There was a meeting in January of 1970. I don't recall the exact date, where we were advised—we had a meeting and at that meeting was Mr. Hertz and Mr. Warner, Mr. Sadlier, myself, Mr. Cohn, I think Mr. Matthews—I don't remember who else was there—(245) where we discussed what the firm was doing, the fact that they were going out of the retail area and selling off the

branches, and how it was now going to be consolidated into one retail operation, one retail branch and an institutional organization, and that we were making money and it would not be a good year as had originally been anticipated but we were making money and everybody was working there, but it is off as far as a number of different things. And we did have a discussion regarding increasing salaries, which was agreed to by the executive committee, and I believe increasing points, profit participation.

Q. I show you this copy of a memorandum dated January 27, 1970 and ask you if you can identify it. A. Yes, I can, and I remember what, and it refreshes my recollection completely.

Q. Is this a true copy of a memorandum that was circulated on or about January 27, 1970? A. I think so, yes.

Mr. Weisberg: I would like to offer this in evidence.

Mr. Genovese: I have no objection.

(Third-Party Defendant's Exhibit J was received in evidence.)

(246) Mr. Weisberg: Mark this for identification.

(Third-Party Defendant's Exhibit K was marked for identification.)

The Witness: If I can go back, I can testify about that meeting because I do recall the meeting.

Q. Mr. Held, that document which you hold in front of you purports to give you a raise of $4000 per year effective as of January 1, 1970. Did you receive such a raise? A. I believe I did, yes.

Q. Was there a discussion prior to that January 27, 1970 date when you requested an additional profit per cent points were offered to you? A. Prior to this date, yes.

Q. Did you accept 2 points in lieu of the 1 point which you were receiving previously? A. In effect, yes.

Q. Now, Mr. Held, you testified that you and Paul Cohn went to see the firm of Javits & Javits as attorneys. Do you recall when that was? A. Approximately mid-February, 1970.

Q. Why did you seek an attorney in February of (247) 1970? A. I had received and reviewed the November 2, 1969 financial questionnaire and had a discussion with, I think, Bob Sadlier—I think it was Bob Sadlier; I just don't recall—wherein this loss had been pointed out to me of a million dollars, approximately, during the last six months of 1969 which had never been told to me. I felt that that was information which should have been told to me and I thought I needed counsel on it. I was just too close to the situation to be objective about it so I went to independent counsel.

Q. How often did you speak to Bob Sadlier from July of 1969 through February of 1970? Once a day? A. At least once a day.

Q. Twice a day? A. Probably.

Q. During that period of time did you ever ask Bob Sadlier for any financial information? A. I believe I did, yes.

Q. And did he refuse to give it to you? A. I believe he said he didn't have it.

You are talking about other financial figures now?

Q. Profits and losses. (248) A. Yes.

Q. Is it a fact that financial statements went out to the limited partners every year to indicate to them the profits of the partnership and how much they would receive on their investment? A. I don't know that.

Joel Held—By Mr. Weisberg—Cross

Q. You are not aware of that? A. No.

Q. You had nothing to do with it? A. Not that I recall. I was only there for nine months. I don't know what happened prior to me being there.

Q. I am saying during the time you were there you never saw these financial statements that went out? A. On a monthly basis?

Q. No, annual basis, as of June 30, 1969. A. The only annual report I saw was that November 2nd report. At least that's my recollection.

* * *

Q. I would like to show you Third-Party Defendant's Exhibit A for identification and ask you if you can identify this document. (249) A. It is the Hertz, Warner & Company statement of financial condition as of November 2, 1969, which I believe was mailed to customers of Hertz, Warner & Company.

Q. Did you ever see that previously? A. I believe I did, yes.

Q. Do you know that this is the financial statement that was mailed out by Hertz, Warner? A. Yes, I think so. But that's not a P & L though.

Mr. Weisberg: I would like to offer this in evidence.

Mr. Genovese: No objection.

(Third-Party Defendant's Exhibit A was received in evidence.)

* * *

(250) Q. Mr. Held, did there come a time when you prepared a securities loan agreement between Peerless Mills and Paul Cohn? A. Yes, I believe so.

Q. Do you remember when it was prepared? A. Not exactly. Probably beginning of October of 1969.

Q. And were you present at its execution? A. No.

Q. Did there come a time when this document was returned to you? A. Yes.

Q. And do you recall when that was? A. It was when the stock was given to me—well, not when the stock was given to me; I don't recall whether the stock was physically given to me but when the corporate resolution and the stock powers and the documents accompanying the stock certificates were given to me. Mid-October, I think, of '69.

Q. After you received the documents back, the (251) securities loan agreement and I guess a corporate resolution—and you testified there were some other documents with it, right? A. I think there were some other documents.

Q. What did you do with the documents when you received them? A. Gave them to Charles Walsh.

Q. He was the transfer clerk of the firm? A. Yes.

Q. Did you at any time file these papers or submit these papers to the New York Stock Exchange for approval? A. Wait a minute now. You are talking about which papers.

Q. Securities loan agreement between Peerless Mills and Paul Cohn. A. I don't think I gave the securities loan agreement to Charles Walsh. I don't recall, but I think I got the securities loan agreement at that time but I am just not sure. If I did get it I probably would have sent it off to the stock exchange, I would think.

* * *

Joel Held—By Mr. Fitzgerald—Redirect

(255) *By Mr. Weisberg*:

Q. Mr. Held, are there any proceedings pending between you and Hertz, Warner at the present time before the New York Stock Exchange?

The Witness: Your Honor, this is where we get into a little bit of a hassle with previous alleged information and my role as a witness and my own counsel.

The Court: Are you claiming some privilege?

The Witness: Yes.

The Court: In telling whether there are proceedings pending?

The Witness: There is a proceeding pending.

The Court: The answer is yes?

The Witness: Yes.

(256) The Court: Next question.

By Mr. Weisberg:

Q. As part of this proceeding is Hertz, Warner seeking to recover from you a certain share of the losses of the partnership? A. Yes, they are.

Mr. Weisberg: No further questions.

* * *

(258) *Redirect examination by Mr. Fitzgerald*:

Q. Mr. Held, going back to one point in your cross-examination concerning the memorandum which reflected the meeting with Hertz, Warner and concerned an alleged raise in pay to you, will you tell us the circumstances surrounding that meeting, please? A. Yes. Mr. Saluc

had been released from the partnership in the latter part of November or early part of December—effective the latter part of November, 1969, and was returned $100,000 of his capital. He was part of the transaction by which a branch office was sold to Walston & Company. The consensus of opinion was to—when I say consensus of opinion, what was told to me by the executive committee—was that the payment of the $100,000 to Mr. Saluc, repayment of his capital, didn't affect the firm and it helped with the transfer of that branch to Walston & Company, and that left a gap because Mr. Saluc had had a proper participation of something in the area of 16 or 18 points.

(259) If I can have that partnership agreement it would help.

Q. 1969. A. The '69 partnership agreement.

Q. All right (handing). A. Right, he had a percentage of 9 points, 9 per cent profit.

With his resignation and the others who had resigned, including Gilman, Kramer, Sheldon and so on, there left a big float of points that were not assigned.

The New York Stock Exchange had a rule at that time requiring a maximum flat. I don't remember what it was but we exceeded it. We had this meeting to determine what was to be done, just a general meeting, and that came up as to what was to be done with Saluc's points, inasmuch as we were now probably in violation of the stock exchange's rules.

At that point a redistribution was made in conformity with my memo. Our salaries as salaries were increased.

Q. Were the points of Mr. Hertz and Warner increased? A. No.

Q. One final area, and before we go to it, that (260) memorandum to which you are referring, which has been marked Defendant's Exhibit—please help me. A. J in evidence.

Q. —reflects the results of the meeting you just testified to. A. Yes.

Q. Is it correct or am I correct in stating, Mr. Held, that you presented the 2000 shares of AT&T stock personally to the AT&T transfer agent on or about September 15, 1970 for transfer back to Hertz, Warner & Company? A. That's correct.

Q. At the time that you presented that particular stock certificate together with the indemnification or letter of correction, did you also hand to the transfer agent Plaintiff's Exhibit 15 in evidence? A. Yes, this letter was submitted—I don't know whether submitted or mailed—with the stock certificate, I believe.

Q. On or about September 15th at the time of the requested transfer back? A. I think so, yes.

Mr. Fitzgerald: Thank you.
No further questions, your Honor.

* * *

(262) *Redirect examination by Mr. Fitzgerald:*

Q. On page 2 of Plaintiff's Exhibit 15 in evidence you state, and I quote:

"In view of the nature and complexity of the situation surrounding the above-mentioned 2000 shares of the stock, it is of the utmost urgency that our client obtain the requested documents as soon as possible."

Did you at the time of presenting the 2000 shares of AT&T stock to AT&T amplify on that statement in the letter?

Mr. Goldstone: Objection, your Honor. He has just testified that he probably mailed this letter. Now, Mr. Fitzgerald is assuming once again that this (263) letter got there at the same time, leading the witness that way.

Mr. Fitzgerald: I withdraw the question rephrase it.

Q. At the time you presented the securities to AT&T for transfer did you say anything to AT&T regarding the nature and complexity of this situation?

Mr. Goldstone: Objection, your Honor. The witness testified already that he said nothing about that, that he simply stated that it was a mistake. Now, Mr. Fitzgerald is arguing with his witness.

The Court: He is not arguing. Let's hear what the witness says.

Did you say anything on that score?

The Witness: I don't recall that I said anything.

Q. Is that the best of your recollection? A. Yes.

Mr. Fitzgerald: That's all.

(Witness excused.)

* * *

(264) Afternoon Session

(2:00 p.m.)

(In open court.)

The Court: All right, let's proceed, please.

Mr. Genovese: Mr. Meyer, please.

Arthur Meyer, called as a witness by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Fitzgerald:

Q. Mr. Meyer, for the record, can you tell us where you live? A. 44 Coconut Row, Palm Beach, Florida.

Arthur Meyer—By Mr. Fitzgerald—Direct

Q. Mr. Meyer, will you give the court a brief statement of your educational background, please. A. I am a college graduate and a member of the New York bar and I have a certificate in engineering.

Q. And upon leaving law school did you engage in the private practice of law? A. Yes, I did. I was associated with a firm.

Q. For how long? A. Three years

Q. And from that occupation where did you go? A. I became an engineer for the General Electric (265) Company. I went back to engineering school when the war started.

Q. When did you go to engineering school? A. From January of 1942 through that year.

Q. And you then took on an occupation as an engineer from when? A. I was working as an engineer during the day and going to school at night?

Q. For how long? A. I continued to work as an engineer through the end of the war.

Q. Did you ever leave the General Electric Company? A. Yes, sir.

Q. What company did you join then? A. A company called Englishtown Cutlery.

Q. In what capacity, sir? A. I was hired to establish a war products division.

Q. Can you place an approximate time, please? A. Probably early in '42, middle of '42.

Q. Did there come a time when you left Englishtown Cutlery? A. Yes.

Q. When was that? A. 1952.

(266) Q. And where did you go? A. I formed a finance company.

Q. Do you recall the name of the company? A. Yes. At that time it was Consumers Time Credit.

Q. And what was the general nature of the business of that company? A. That business was engaged in the financing of consumer credit. Subsequent to that I formed a commercial finance company called Alben Affiliates.

Q. When did you form Alben Affiliates, sir? A. I believe about 1958.

Q. What was the nature of Alben Affiliates, sir? A. Capital loans.

Q. Capital loans to what types of businesses? A. Commercial enterprises.

Q. Corporate? A. Yes.

Q. Did there come a time when Alben Affiliates was liquidated? A. Yes, its assets were sold to Hertz, Warner & Company.

Q. Hertz, Warner & Company? A. Hertz, Warner & Company created a corporation (267) called Hertz, Warner Affiliated Corporation.

Q. From the assets of Alben Affiliates? A. I guess technically the corporation acquired the assets of Alben Affiliates, yes.

Q. What was the nature of the business of Hertz, Warner Affiliate Corporation? A. It continued the operation of Alben.

Q. Which was what? A. Capital loans.

Q. And when, to the best of your knowledge, did Hertz, Warner Affiliate come into being? A. Hertz, Warner Affiliate.

Q. Yes. A. I guess it was '62.

Q. And what, if any, was your connection with that company? A. I became a vice president and a director.

Q. Were you a stockholder in that company? A. Yes, I owned 10 per cent of the common stock of the corporation.

Q. Could you name the other stockholders in Hertz, Warner Affiliate, please? A. The partnership Hertz, Warner & Company owned 80 per cent and the other 10 per cent was owned by my former (268) general partner in Alben Affiliates, Mr. Joseph Blau.

Q. Is Mr. Blau a lawyer? A. No, he is a certified public accountant.

Q. I see. Can you relate to us the circumstances when you first made contact with Mr. Hertz or Mr. Warner? A. I had a rather large account at Francis I. du Pont, handled by a Mr. Simpken, Ed Simpken, who was the registered representative handling the account, and he moved from du Pont to Hertz, Warner & Company and solicited our account. I told him that I would not move the account until I had an opportunity to study the company and meet the principals.

Q. And did you meet the principals? A. Yes. Mr. Hertz met with me.

Q. When, do you recall? A. Not exactly.

Q. Well, was Hertz, Warner Affiliate & Company created at the time? A. No, that didn't come until several years later.

Q. I see. Did there come a time when you began having discussions with either Mr. Hertz or Mr. Warner concerning the possibility of your becoming a limited (269) partner in that firm, in the firm of Hertz, Warner & Company? A. Yes.

Q. When, to the best of your recollection, did that occur? A. I think it was '66, maybe '67, I'm not sure.

Q. And did those discussions culminate in your becoming a limited partner of the firm of Hertz, Warner & Company? A. The first discussion I think resulted in my wife becoming a limited partner first.

Q. Were there subsequent discussions concerning the possibility of your becoming a limited partner? A. Yes.

Q. And did those discussions result in your taking on the status of a limited partner in the firm of Hertz, Warner & Company? A. Yes.

Q. Could you tell me at or about what time you assumed that status? A. I didn't have anything to refresh my recollection but I knew I was a limited partner during the calendar year '68. It may have been earlier but I can't find anything.

(270) Q. Do you recall signing any articles of limited partnership with the firm of Hertz, Warner & Company? A. Yes, I've signed limited articles for a limited partnership in 1968.

Q. And did those articles of limited partnership pertain to the fiscal year commencing July 1, 1968, to the best of your recollection? A. Yes. Maybe July 1, '67. I'm not really sure. Yes, it probably was for the fiscal year commencing July 1, '67, which was referred to, I guess, as the 1968 agreement.

Q. I am going to show you what has been marked Defendant's Exhibit H in evidence and ask you whether or not you can state for the record that you ever saw any of that particular agreement. A. Yes. It looks like one that I signed, similar to one that I signed.

Q. And can you recall the amount of capital contribution you made to the firm at the time of assuming the status of limited partner? A. We had something of a problem in answering that question. I transferred from

my regular account $150,000 worth of securties. However, it was not clear whether my investment was $150,000 or 100, because (271) I was paid on the basis of 100,000. The stock exchange rules, they had what is termed a haircut and they only gave credit for the net value after what their rules required by way of haircut. So we were told, the limited partners were told by Mr. Warner and Mr. Hertz, that we had a choice of either putting in 100,000 in cash or $150,000 in securities. So whether my capital was 100,000 or 150,000 is something that even to this day we have a dispute about. It's an academic dispute at this point, of course.

Q. Who are the people which you had a dispute with as to the value of that account? A. Well, we had some difficulties that were generated subsequent to the demise of the company.

Q. You had no discussions at or about the time of making the contribution as to its value with Mr. Hertz or Mr. Warner? A. Yes, I did. I'm indicating the facts, We were told we could either make $100,000 in cash or $150,000 in securities, that they were equal.

Now, we were paid interest on the basis of 100,000, not the 150,000, and we were given the return as a limited partner based upon the 100,000 value as cash rather than the 150,000.

(272) So the question is not as clear as it would seem. That's why I'm giving you a long answer.

Q. This is your understanding of it? A. Yes.

Q. With respect to your status as a limited partner under the 1968 agreement which you have identified, did you participate in the profits of Hertz, Warner & Company? A. Yes.

Q. Do you recall, without referring to the agreement, the amount of profits in which you participated in or were entitled to? A. No, I do not.

Q. Would the agreement refresh your recollection? A. Yes, it would.

Q. Would you look at it, please. A. Yes.

Two per cent of the profits and zero percentage of losses.

Q. So in effect then it is your testimony that under the '68 agreement you would be entitled to 2 per cent of the profits but you would not be responsible for any losses which would be incurred during the fiscal year, (273) is that correct? A. That is correct.

Q. Did you have any discussions with Mr. Blau concerning the 1968 agreement which has been marked Defendant's Exhibit H in evidence?

Mr. Weisberg: We will object to that question on the ground of hearsay.

Mr. Fitzgerald: I'll withdraw it, your Honor.

Q. Were you present at any discussions with any member of the firm of Hertz, Warner & Company when the status of Mr. Blau was discussed pursuant to the terms of the '68 agreement? A. No, but my copy of the agreement showed that Mr. Blau had signed as a limited partner so I knew he was a limited partner.

Q. I see. And you mentioned that a certain amount of securities in the sum of 150,000 was segregated in your trading account and that represented your capital contribution, is that correct? A. Transferred from my trading account to the capital account.

Q. Could you trade in that capital account? A. Yes, through a complicated device of exchange (274) stock from the capital account to the trading account in equal value and then you could sell the particular security. You couldn't actually trade in the capital account per se.

Q. Could you explain to the court what you understand to be the New York Stock Exchange haircut, please? A. I think it is a matter of their rules and regulations, but I understood that they only gave credit in their relations for their capital rule for two-thirds of the value of the stock.

Q. In other words, if securities were contributed as capital, then by the rules of the exchange a penalty would be imposed on the value of that stock, that by reducing the stated value of its exchange. A. For capital purposes, yes.

Q. I see. To go back a moment, Mr. Meyer, concerning the question of valuation, at what point, to the best of your recollection, was this question debated between yourself and the partnership? A. Well, there wasn't any real debate because it was just a misunderstanding. When I was told that the partnership treated $100,000 in cash and $150,000 in securities on an equal basis and they paid me interest (275) only on the $100,000 valuation, I assumed that my limitation was $100,000.

This became a problem in the 1969 agreement because I wanted it clarified when I reread the agreement and saw that it wasn't clarified.

Q. Did there come a time when you engaged in discussions with either Mr. Hertz or Mr. Warner concerning the proposed July 1, 1969 Hertz, Warner partnership agreement? A. Yes.

Q. When, to the best of your recollection, did you first have any discussions with them? A. I would guess some time in May or June of '69.

Q. And do you recall in substance what Hertz or Mr. Warner said to you concerning the proposed July 1, 1969 agreement at that time? A. Yes. They asked if we were

prepared to take a greater interest in the profit and to take a percentage of the loss in lieu of the previous agreement where we had a smaller percentage of the profit and no percentage of the loss.

Q. Do you recall who made this particular proposal to you? (276) A. Mr. Hertz.

Q. And when you said "we," to whom were you referring, Mr. Meyer? A. Mr. Blau and myself were present together with Mr. Hertz and myself, together in our offices. Our offices were not the offices of Hertz, Warner & Company.

Q. Where were your offices? A. The office of Hertz, Warner Affiliated was 200 Park Avenue, New York City, the Pan Am Building.

Q. At the time of this proposal concerning your capital contribution and the loss ratio, was Mr. Warner also present at that conversation? A. I don't recall him being there.

Q. I see. What did you say to Mr. Hertz when he made this proposal to you? A. I told him that I would be inclined to do it if we reduced the capital in my wife's account, which at that time was $330,000, down to $150,000 so that actually I would be increasing my captial from 150 to 300 thousand. Actually, it was having $30,000 less capital. But the question that I had raised earlier in my testimony, I wanted that clarified in the agreement, together with the two other major—what I considered major changes in the agreement as relating to ourself.

(277) Q. Please continue. A. This is what the conversation was.

Q. Yes. A. I wanted it clearly understood that should the value of our securities diminish, that our liability would be limited to the value of our securities and not to any funds other than the value of the securities.

On the other hand, I wanted it clearly understood and spelled out that with regard to the general partners, their capital contribution would be maintained at a fixed dollar amount regardless of the dollar value of their securities. So that we could rely on the capital of the general partners to be available to absorb any losses.

Q. And you expressed this sentiment to Mr. Hertz at this meeting in or about May or June, 1969? A. Yes.

Q. Prior to this meeting in May or June of 1969, Mr. Meyer— A. I had better correct that "yes." I think what I said was that there were necessary changes in the agreement and that I would consult with my counsel and have him write the form of the changes that we wanted. I don't know that I actually spelled out the changes because (278) I was relying on professional advice and I think I said I was going to consult counsel and have him write a letter requesting the changes. So I am not sure that the date is right. That discussion took place at that time with regard to the details of the changes.

Q. But you did have a discussion at that time wherein Hertz did make that particular proposal? A. Yes.

Q. Did you say anything specific, other than what you testified to, with respect to a percentage of losses or the assumption of percentage of losses? A. I said that if the capital was reduced from my wife's account to my account and we limited the losses to the amount that was in the account or the value at any given time of the securities which were in the account and the other changes that our counsel would suggest in the agreement were effected, that we would then accept a percentage of the loss.

Q. Prior to this conference or meeting with Mr. Hertz in or about May or June of 1969 had you been supplied or did you receive any monthly profit and loss summaries for

any of the months from January 1, 1969 through May of 1969? A. Well, I would say that I did not get monthly (279) profit and loss statements, but we used to have executive committee meetings of Hertz, Warner Affiliated Corporation of which Mr. Hertz was the president. After we reviewed our activities, we would frequently say how is our investment doing downtown. He would give us highlights of the figures and the activity, in some cases the figures which were being submitted periodically to the New York Stock Exchange regarding the capital rule.

Q. And did you have any of these conversations with Mr. Hertz during the period January 1, 1969 through May of 1969? A. Yes.

Q. And do you recall specifically how many conferences there were? A. Probably not more than two.

Q. Do you recall the substance of any conversations that you had with Mr. Hertz at those two conferences? A. Well, I think that the figures that he was submitting showed a diminution in capital. So we inquired as to the reason for it and we were apprised that the general business of the partnership was going through a metamorphosis. They were revising the business from a retail-oriented firm to a wholesale-oriented (280) firm with the result that they were going to close all of their retail branches and that this was an expensive proposition that was going to reflect adversely on their profit and loss for the year.

Q. Did he tell you during the period January 1, 1969 through May 30, 1969 that the firm was incurring monthly losses? A. Yes.

Q. Did he indicate the extent of those losses? A. I don't think anybody really knew because there were write-offs of assets as you closed the retail branches, but my own reaction, as an investor, was that this was something that was highly desirable. As a matter of fact, Mr. Warner was

commented upon in Fortune. I think there was an article written that he was one of the first persons to recognize the difficulty of operating a retail stock exchange business on a broad basis. I thought that it showed great management foresight to have started liquidating the retail offices before it became a general practice.

Q. But at no time, so that the record is clear, did Mr. Hertz tell you the amount of the losses that were being incurred?

> Mr. Weisberg: Objection, your Honor. (281) I believe he testified just to the contrary.
>
> The Court: Whatever he said let's leave and I will sustain the objection to that leading question.

Q. Did there come a time, Mr. Meyer, when your attorney drafted for you a memorandum of the suggested changes with respect to the proposed 1969 partnership agreement? A. Yes, sir.

Q. Mr. Meyer, I show you what has been marked Plaintiff's Exhibit 19 for identification and ask you if you can identify that particular document, please. A. I am not sure that I ever saw this document. I left it to my counsel. We were busy running another business. I had had a meeting with him in which we reviewed what changes should be made, but I don't believe I ever saw this document until much later, many months later. He sent this directly to Hertz, Warner.

Q. When was the first time you saw it? A. I think it was in January of 1970.

Q. And the document marked Plaintiff's Exhibit 19 for identification, can you identify that as the same document? (282) A. It seems to be the document, yes, sir.

Mr. Fitzgerald: Your Honor, I offer Plaintiff's Exhibit 19 for identification in evidence.

Mr. Weisberg: No objection, your Honor, subject to connection.

(Plaintiff's Exhibit 19 is received in evidence.)

Q. Mr. Meyer, can you relate to the court what Mr. Hertz and Mr. Warner's reaction, if any, were to your proposals concerning the suggested revisions of the 1969 partnership agreement? A. I had the impression that basically he approved them but needed to get his counsel to review them and get them transcribed into form for execution.

Q. When you say "he" to whom are you referring? A. Mr. Hertz.

Q. And did Mr. Hertz ever tell you that he would agree on behalf of the partnership to accept your particular proposals? A. I don't think so, but he did say that he was having it reviewed.

Q. Well, did Mr. Hertz ever take any affirmative action on the particular proposal? (283) A. No.

Q. And he never communicated his acceptance of those proposals to you? A. Neither acceptance nor rejection.

I might say, however, that with regard to the capital account we had agreed that my wife's capital account was going to be reduced, and I called Mr. Held when I got the papers in November to indicate to him that the amount was in error. He said he would correct it. We never got another draft.

Q. You then have testified that you did receive a copy of the proposed 1969 partnership agreement in the mail, is that correct? A. I didn't say in the mail and I am not sure how I got it but I had it.

Q. You did have and see a copy of the proposed agreement, is that correct? A. Yes.

Q. I show you what has been marked Plaintiff's Exhibit 1 in evidence and ask you if this is a copy of the proposed 1969 agreement which you say you had. A. Yes. This looks like what was submitted to me.

Q. Do you remember for the first time when Plaintiff's (284) Exhibit 1 in evidence was submitted to you? A. I had the impression it was November.

Q. Do you remember by whom it was submitted to you? A. No, sir.

Q. Prior to November and subsequent to your conversation with Mr. Hertz in or about May or June, 1969 did you have any further discussion concerning the proposed terms and conditions of the July 1, 1969 partnership agreement? A. He told me that they were late in preparing the modification and that it would come as soon as he had it. And nothing happened between that discussion and November when I got this draft.

Q. Could you tell us what modification you are referring to? A. The modification that we had—that I have testified to.

Q. As expressed in the memorandum which has been marked as Plaintiff's Exhibit 19 in evidence? A. That I am not quite sure of because I think that that memorandum refers to the agreement that I am saying I received in November.

Q. Well, then, the modifications which you (285) have already testified to concerning capital accounts, valuation? A. And the changes that we had talked about generally.

Q. Assumption of losses also was included in that? A. Yes.

Q. Do you recall any further conversations with Mr. Hertz during the period June 1, 1969 and approximately November 15, 1969, regarding the assumption of loss by you under the proposed 1969 agreement? A. Well, we were getting impatient that we weren't getting the documentation.

Q. Did you have any discussions with him, though, with Mr. Hertz? A. Not that I can remember, other than when were we going to get them.

Q. You made a proposal to Mr. Hertz in or about May or June of 1969? A. I didn't make a proposal. He made a proposal to me.

Q. You counterproposed certain conditions, is that correct? A. No. We had a discussion.

(286) Q. I see. And at that time you related to him what you wanted to see in the '69 agreement? A. Just very generally. As I said, I told him that I would have our counsel work out with their counsel to provide for the agreement to be in accordance with what would be acceptable to my counsel and myself.

Q. And what happened when you received a copy of the agreement in or about November of 1969, what did you do next? A. I called Mr. Held and said that there were errors in the agreement that did not reflect what we had talked about, and that I was sending it over to my counsel who would then make an analysis, and I think that letter came as a result of that.

Q. The memorandum which has been marked as Plaintiff's Exhibit 19 in evidence? A. Yes.

Q. Did you tell Mr. Held anything else in or about November of '69? A. No.

Q. Do you recall what specific areas you discussed with Mr. Held in this telephone conversation? A. The most

specific one is that he had the capital for my wife with a figure that was all wrong. (287) He said that's an error he would correct immediately. I said all the other clauses we were supposed to have in this agreement haven't been incorporated in the agreement. He said he was getting to that.

Q. Did you have any discussions with Mr. Hertz or Mr. Warner subsequent to November, middle of November, 1969, after the conversation with Mr. Held concerning the proposed 1969 partnership agreement? A. I had a discussion with Mr. Hertz in December, when I was about ready to go to Switzerland for my Christmas vacation.

Q. That was the next one, to your best recollection? A. Yes.

Q. Could you relate to me the substance of what Mr. Hertz said to you? A. He asked me why he hadn't received the executed copy from my family and myself, and I indicated that when I get back in January hopefully the revised documentation would be available.

Q. Could you explain to me what you mean by "revised documentation"? A. Well,—I meant that the agreement would be revised in accordance with the letter that Mr. D'Atrie (288) of Feldesman & D'Atrie had written.

Q. Plaintiff's Exhibit 19 in evidence? A. Yes.

Q. And what did Mr. Hertz say to you at that time? A. That he was working on it.

Q. And up until this point had you signed the proposed 1969 partnership agreement? A. I have never signed that agreement.

Q. When was the next time you had any communication with Mr. Hertz or Mr. Warner or anyone from Hertz, Warner concerning the proposed July 1, 1969 partnership agreement? A. I would say some time in January when I got back from my vacation.

Q. And with whom did you have the communication? A. Mr. Hertz.

Q. Discussion, meeting. A. I don't recall it being a meeting, but it may have been. But I do know that there was supposed to be a meeting with Mr. Hertz and Justin D'Atrie. Whether that happened or not I'm not sure. But I had suggested the best thing for him to do was to have his counsel meet with my counsel and get it straightened out.

(289) Q. Did you talk to Mr. Hertz in January, 1970 concerning the proposed '69 agreement? A. Yes, to the extent I have just indicated.

Q. You inquired as to whether there had been a meeting with your counsel? A. Yes.

Q. And what did Mr. Hertz, say? A. I really do not remember. I mean I just—

Q. Did you inquire of Mr. Hertz as to the status of your proposals for the 1969 agreement at that conference in January, 1970? A. I can only say that I had the impression through January and through February that he was still working on it.

Q. I see. But prior to or up until this time period that we are talking about, Mr. Hertz or Mr. Warner or no one on behalf of Hertz, Warner & Company communicated their assent to you to your proposals? A. Well, their indication that they were working on them gave me the indication or the assumption that they were assenting.

Q. They never told you that they would accept it, though, up until this point, did they? A. I got the impression we had an agreement in (290) principle, but I can't say beyond the agreement in principle that all the details were resolved.

Q. What was your agreement in principle? A. What I have previously testified to. Basically that the capital

would be treated in accordance with my requests and that their capital would be treated in accordance with my requests.

Q. Then did you ever see a proposed partnership agreement which incorporated all of your particular proposals into it for your signature? A. I didn't, but at that point, as I said, when I left for Europe I turned the thing over to Mr. D'Atrie and asked him to please get it in shape if he could.

Now, I don't know whether he ever received any counterdocuments or not.

Q. Did there come a time after January, 1970 when you were asked again to sign the proposed 1970 partnership agreement—'69 partnership agreement? A. I think the thing just started to drift about that point. About March I indicated that in view of the fact that we had not gotten it, I wrote a letter saying I would like to withdraw as a partner.

Q. Mr. Meyer, you testified to advising the firm of your withdrawal as a limited partner. I show (291) you what has been previously marked as Plaintiff's Exhibits 22 for identification, 23 for identification and 24 for identification, and ask you if you can identify those particular exhibits? A. Yes. I think there are a few more.

Q. You recognize these particular letters? A. Yes.

Q. And did you write them? A. I didn't write them.

Q. But did you see them at or about the time of March 25, 1970? A. I signed that one and my wife signed that. I recognize her signature, but who wrote them, I presume our counsel wrote them.

Mr. Fitzgerald: I offer into evidence Exhibits 22, 23 and 24 for identification.

Mr. Weisberg: I would like to have a voir dire on these documents.

Voir Dire examination by Mr. Weisberg:

Q. Did you ever receive back the duplicate copy as indicated on the letter, to the best of your knowledge? A. My recollection is that my wife and I signed those letters and left them with our attorney. What (292) happened after that I'm not sure.

Mr. Weisberg: No objection, your Honor.

(Plaintiff's Exhibits 22, 23, 24 were received in evidence.)

Direct examination by Mr. Fitzgerald (Continued):

Q. Mr. Meyer, do you recall writing a letter to Mr. Hertz in or about July of 1970 concerning your status under the proposed 1969 partnership agreement? A. You will have to refresh my recollection.

Q. I show you what has been marked Plaintiff's Exhibit 25 for identification and ask you whether you can identify that letter. A. This was prepared by my counsel. It was retyped on my stationery.

Q. Did you sign it? A. Yes, sir.

Mr. Fitzgerald: I offer in evidence Plaintiff's Exhibit 25 for identification.

Mr. Weisberg: No objection.

(Plaintiff's Exhibit 25 was received in evidence.)

Q. Mr. Meyer, did there come a time when you concluded that the '69 agreement was not going to be (293) modified pursuant to your proposals? A. I came to that conclusion right at the end of March that we just weren't getting anywhere, so I had better get out.

Q. And— A. March, '70.

Q. And did there come a time when you discovered that Hertz, Warner & Company had suffered financial reversals in its operations commencing in January of 1969?

Mr. Lipkin: I object to the form of the question, your Honor, as being too vague and not calling for a specific time and for a specific—what kind of reversals are meant, short-term reversals, long-term reversals, capital reversals, or what?

The Court: I will allow it. Then it can be spelled out one way or another.

You may answer.

Mr. Fitzgerald: Read back the question.

A. Read back the question, because I think you said January, '69. Did you?

Q. Yes. A. Is that what you want?

Q. That's correct.

(294) (Question read.)

A. I have previously testified that during the period from January through May of '69 I was aware that the company was losing money in the liquidation of its retail operation.

Q. Did there come a time when you learned that the firm had lost over $1 million during the period January 1, 1969 through June 30, 1969? A. The way you phrase that question you are making an assumption that it is true. I don't think anybody in the world can tell you that's true or not.

* * *

(295) (Pause.)

Mr. Fitzgerald: I have no further questions, your Honor.

Cross-examination by Mr. Weisberg:

Q. Mr. Meyer, can you tell the court whether or not you made any inquiry as to the firm of Hertz, Warner prior to investing money in the firm as a limited partner? A. Well, I made original inquiry into the company before I transferred my account there, and it was at least two years after I transferred my account before I became a limited partner, at which time I did receive three-year certified fiscal figures, made an analysis, (296) bearing in mind that my expertise in business was a finance man and theoretically a good credit man until this incident, and I did make an attempt to ascertain whether or not this was an investment that I could appropriately make.

Q. What records, financial records, did you request of Hertz, Warner and which ones did you receive during this period when you were doing your investigation? A. I had three-year consecutive fiscal figures.

Q. Was that balance sheets and profit and loss statements? A. I would have to say I think so. I do know I had the balance sheets. Whether I had P & Ls at this point I'm not quite sure. I was quite capable of taking a balance sheet and making my own computations of profit and loss.

Q. Did there ever come a time when Mr. Hertz or Mr. Warner denied any of your requests for financial information concerning the company? A. No.

Q. Would it be a fair characterization that your negotiations with Mr. Hertz concerning the 1969 partnership agreement were on-going in that they commenced in or about June of 1969 and continued through March or— (297) let's say March of 1970? A. They were on-going until I finally came to the conclusion that enough time had elapsed and I ought to terminate.

Q. At no time between June of 1969 and March of 1970 did either party, to the best of your recollection, take an absolute, flat position, either "Yes, I'm signing it," or, "No, I will not agree to certain terms"; did that occur during that period, to the best of your knowledge? A. I would say it was an on-going negotiation.

Q. Now, up until March of 1970, from the period of June, 1969 up to and including March of 1970, did you ever say to anyone at Hertz, Warner, "No, I will not sign the 1969"—I'm sorry—"No, I will not sign a partnership agreement for the fiscal year beginning July 1, 1969"? A. I have already testified as to what my position was.

Q. Do you know approximately how much capital the Meyer-Blau group invested in Hertz, Warner in 1968? A. First of all, this Meyer-Blau group designation is not one that is definitive as far as I'm concerned. I don't know what you mean by the Meyer-Blau group.

Q. There were seven individuals who for the purposes of the litigation were designated as the Meyer-Blau (298) group. A. I heard that today for the first time. What do you consider the Meyer-Blau group?

Q. For the purposes of the litigation, Joseph Blau, Diane Fisher, Philip Fisher, Sydelle Meyer, Marjorie Alfus, Lawrence Blau, your wife as trustee of the Wendy Alfus trust and as trustee of the Mitchell Alfus trust, and yourself was termed in this litigation the Meyer-Blau group. A. Well, as to that group, I spoke for everybody that were all related to me, either father-in-law, mother-in-law, sister-in-law or nephew-in-law, except Joseph Blau and his son, and Joseph Blau was quite capable of speaking for himself. So he did not speak for me and I didn't speak for him.

Q. All I wanted to know is do you know approximately how much was invested, how much capital was invested,

by these individuals into Hertz, Warner in 1968 or was in capital in 1968. A. I guess the '68 agreement speaks for itself.

Q. So, in other words, the amount listed on the '68 agreement, to the best of your knowledge, reflects the amount of money that was contributed by these individuals or securities, cash or securities? (299) A. Let's get that clear because, again, it was all in securities, and at the time I assumed that the value of the capital was the amount in which the partnership was paying interest, which was the 33 per cent less capital than is reflected.

Q. Did there come a time— A. Incidentally, to finish my statement, the securities representing the amounts shown were deposited.

Q. Did there come a time when this capital was withdrawn from Hertz, Warner & Company? A. To the best of my recollection every dollar was lost.

Q. When you say lost you mean it was sold out as part of the liquidation? A. I meant that we didn't get back one cent.

Q. Did there come a time when you made any additional contributions to capital in addition to this amount? A. Yes.

Q. And when was that? A. I guess in 1970. It might have been '71, I'm not sure.

Q. Do you know how much you contributed? A. I know how much I contributed.

(300) Q. How much did you contribute? A. 75,000.

Q. Do you know how much Mr. Joseph Blau contributed? A. Yes, $75,000.

Q. And was there a loan made at this time? A. Yes, there was.

Q. And who made that loan? A. A partnership created by Mr. Blau and myself called M & B.

Q. And how much was the amount of this loan? A. $100,000.

Q. Did you ever get any of that money back? A. Yes, I got back 50,000 of the $100,000 loan. We settled for that, waived the balance.

Q. Now, there is in evidence Exhibits 22, 23 and 24, which is a letter dated March 25, 1970.

I show you these letters and ask you whether or not to your knowledge these letters were ever received by Hertz, Warner & Company. A. No. I testified I signed this, and this is my wife's signature, but I have no knowledge other than that. We left it with our counsel.

Mr. Weisberg: No further questions, your Honor.

(301) The Court: Anything else from Mr. Meyer.

Mr. Fitzgerald: Redirect, your Honor.

Mr. Wagner: No cross your Honor.

Redirect examination by Mr. Fitzgerald:

Q. Could you explain to the court, Mr. Meyer, the facts and circumstances surrounding your contribution of additional capital in 1970, please? A. My counsel recommended that we eliminate a suit for a very significant amount of money brought by Arthur Liman's firm, Rifkind, Garrison, et cetera, against Mr. Blau and myself, alleging that even though we never signed the '69 agreement, we had signed, and there was some diminution in values in our account and my wife's account, and we felt that it was better to pay and get a release and to go on and try to make the money back in my regular business. So we just treated it as an additional capital account but it was in settlement of the whole mess.

Q. But did you receive anything in return for that capital other than the release? A. I received a general release.

Q. How much was the capital contribution on your behalf? A. $75,000.

(302) Q. Was that made in conjunction with the purchase of the assets of Hertz, Warner Affiliate by your new company? A. I would say it was made at or about the same time. I don't know if you could say it was made in conjunction with.

Q. What is M & B Company? A. A partnership consisting of Mr. Blau and myself as general partners, and our children as limited partners.

Q. Did M & B Company acquire the assets of Hertz, Warner Affiliate? A. Yes, we did.

Q. Did that M & B Company acquire those assets at or about the time you made the additional contribution of $75,000? A. Yes, we did. It was at or about the same time.

Q. On your cross-examination, Mr. Meyer, you had some problems with the designation of the Meyer-Blau group. I just wanted to refresh your recollection and show you again Plaintiff's Exhibit 25 in evidence and I want to ask you to read, if you would, into the record the first paragraph of that particular letter.

* * *

(303) Q. Does that refresh your recollection as to a designation of the Meyer-Blau group at the time that letter was written? A. Yes, it does.

Q. So that it had been used prior to the litigation, is that correct? A. Yes. I see it was used by me.

Mr. Fitzgerald: No further questions.

* * *

Irving Hertz—By Mr. Lipkin—Direct

(327) IRVING HERTZ, called as a witness by third-party defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Lipkin:

Q. Mr. Hertz, where do you reside? A. 985 Fifth Avenue, New York City.

Q. Have you been in the securities business for a number of years? A. Since December 15, 1960.

Q. And what was the significance of December 15, 1960? A. I purchased a seat on December 15, 1960.

Q. A seat on the New York Stock Exchange? A. Yes.

Q. And did you work for a brokerage house at that time? A. No. I started with a brokerage firm on January 1, 1961, a newly formed firm called Lieberbaum & Company.

Q. For how long were you with Lieberbaum? A. Until August of 1963.

(328) Q. In August of 1963 you formed Hertz, Neumark & Warner? A. No, I formed Hertz, Neumark & Warner on October 8, 1963.

Q. Fill in those four months. A. The four months was the formation or the start of Hertz, Neumark & Warner, but the approval date of the New York Stock Exchange came on August 8, '63.

Q. During the period which you were forming Hertz, Neumark & Warner, whose participation did you have? In other words, who founded the company with you? A. There were several partners. Myself, Henry Warner, Mr. Morton Boerer, Norman Carney, Ronald Neumark, and I believe Paul Cohn but I don't know if he came in on the exact date.

Q. How did Paul Cohn become a founding partner? A. Paul Cohn worked as, I believe, a registered repre-

sentative at Lieberbaum & Company during the time I was at Lieberbaum & Company and left there to go to a firm by the name of J. Williston, Beame as a registered rep while I was at Lieberbaum & Company.

Upon the formation of Hertz, Neumark & Warner Ronald Neumark, who was a partner of both firms, contacted Paul Cohn to discuss his association with us in (329) the new firm of Hertz, Neumark & Warner.

Q. How much capital did you have in Hertz, Neumark & Warner? A. At the outset I would estimate between five and six hundred thousand dollars.

Q. Is that for the total company? A. Total company.

Q. Of that five or six hundred thousand dollars, how much was yours? A. I believe 215,000.

Q. Represented by your seat? A. Represented by my seat at the time.

Q. How much did Paul Cohn put in as a capital contribution? A. I don't recall. I heard his testimony and I presume he was correct at that time of $15,000.

Q. You then continued in business as Hertz, Neumark & Warner? A. Yes.

Q. What was Paul Cohn's capacity with Hertz, Neumark & Warner? A. Primarily a producer, a registered rep with a partnership participation.

Q. Do you recall what his participation was? (330) A. Again the record speaks for itself. He said it was 5 per cent. I'll accept it but it was somewhere between 3 and 5 per cent.

Q. Did you get to know Paul Cohn personally? A. Yes, I knew him quite well. From the Lieberbaum days through Hertz, Neumark & Warner, quite well.

Q. Did you ever see him socially? A. On some occasions, yes.

Q. Did you know his family? A. I knew his father quite well. I knew his mother too, yes.

Q. His father's name is what? A. Herman Cohn.

Q. During the period between 1963 and 1965, the time which Paul Cohn testifies he terminated his partnership, did you have an opportunity to observe Paul Cohn in his activities in Hertz, Neumark & Warner? A. Yes, constantly.

Q. And did it appear to you that he was familiar with the brokerage operation? A. Well, he was quite young. He learned a great deal during his regime with us as an employee, partner, and partner again. In the early stages of his (331) association with us there was a big difference between his intellect as relating to the security business, as it started some time in '65 and '66. He was a salesman in '63 and '64 and '65, and I would say he really started coming to maturity in the '65, '66 and '67 area.

Q. What happened in 1965 with regard to his partnership in Hertz, Neumark & Warner? A. Paul Cohn at that time was a very emotional young fellow and couldn't seem to function properly with an ownership—

Mr. Genovese: I object, your Honor. He asked what happened and he is giving his reactions to Mr. Cohn's mental mechanics at the time.

The Court: I will allow it.

Go ahead.

A. Paul Cohn came in to see me and decided—he told me he decided that he would like to resign from the partnership of Hertz, Neumark & Warner and that he would feel more comfortable just operating as a registered representative.

I asked him at that time, "Paul, do you really understand what you are doing? Because it's a shame to give up your allied membership." At that time allied memberships of the New York Stock Exchange were (332) quite valued and respected in the industry.

He said, "I realize that, but unfortunately I just don't seem to be able to function with what I have here."

His father called me, Herman Cohn. He was fairly distraught—

Q. Don't tell me what Herman Cohn said. What did you say to his father? A. I suggested to his father that he really should think it over and there is nothing really wrong that's going on and I don't quite understand Paul's attitude. Not that I needed him as an allied member, but he did start with us and the firm was doing quite well.

Q. The firm was profitable? A. Yes, we were always profitable.

Herman said to me—or if I can't relate this—

Q. Don't say what Herman Cohn said to you. A. The essence of the conversation was that I was unhappy that he was doing this but if he was, I'll leave the door open and let's see what happens.

He resigned and he got his money back plus an accrued profits he might have had in the percentages (333) of the firm.

Q. He then continued to work at Hertz, Warner & Company. A. Yes.

Q. When did Hertz, Neumark & Warner become Hertz, Warner & Company? A. I would say it was the latter part of '68 but I'm not sure.

Q. Was there any difference, let's say, when you changed the name of the firm, in substance as to each year, amending it each year, the articles of partnership? A. No.

The partner Ronald Neumark, who was the founding partner, decided he wanted to leave and we didn't want to carry his name so we just made the change in the name.

Q. Can you then state that the entity that became Hertz, Warner was the same one from 1963 forward? A. I would say it was identical.

Q. During the years following Paul Cohn's termination as a partner you say he continued to work as a registered representative? A. Yes.

Q. Did he during that period have given to him greater responsibility in the firm? (334) A. As the years progressed, yes, and Paul had worked directly with Henry Warner in many areas concerning the sales effort of our business. He had greater ability in concept of the brokerage business as the years went on, and he had access and he utilized this access to our back office operations. He was quite astute in that area as well. He became a very important employee of our firm.

Q. Would you say that he became an executive during that period? A. I would say he took on the class of a junior executive, yes.

Q. Did you seek his advice? A. Well, we talked many times and he would keep me apprised of many things that he saw in the firm that we discussed, whether it was back office or ideas in relationship to syndications and a variety of things. We were all in the same office together, Henry, myself, all the main people of our firm were under the same roof and we were all within two seconds of one another, so we had close proximity to each other and we were constantly talking to one another. We had a very viable firm.

Q. Would you say that you spoke to Paul Cohn on a daily basis? (335) A. Constantly. When I say constantly, we always took to one another. On a daily basis, yes.

Q. Did you go out to lunch with each other on occasions? A. On occasions we had dinner together, cocktails together.

Q. Had he ever been to your house? A. I believe he was, yes.

Q. Had you ever discussed matters with Paul Cohn—other than the partnership? A. Paul—

Q. I am talking personal matters. A. Yes. Paul Cohn apparently looked at me somewhat as his second father and related to me most of his personal problems that he had during the time that I knew him. We discussed this at great length, and a lot of the conversations related to his personal problems, which I believe I was able to help him with.

Q. Let's come into the period of 1968 going into 1969. Did the question of Paul Cohn becoming a partner again come to your attention? A. Yes, it did.

Q. How did it come to your attention? A. I believe, if I can recall, since the (336) relationship between Paul Cohn and Henry—because Henry, Henry Warner, was in charge of all sales, retail and syndications, and trading activity—that there were conversations relating to Paul's becoming a partner again with Henry. Henry brought it to the attention of the executive committee, and at that time there were four of us, and our executive committee, whenever it occurred—and I don't know exactly the time—we said, "Henry, use your own judgment. If you feel he is prepared for it and ready to accept it, then it's fine."

Q. Just to digress for a second, your office, was it easy access to everyone or did people have to go through a secretary to get to see you? A. No, I had no secretary. We had three offices, which consisted of Mr. Warner, Henry Warner, Norman Carney and myself, which overlooked

our order room activities. Mr. Saluc's office was out in the board room, Paul Cohn's office was in the board room. The board room was within 50 feet of our offices.

Q. It was the general practice for them to go in and out of your offices to speak to you? A. Yes, we had that kind of operation.

Q. There is a time that the question of his becoming a partner again came up. Did Paul Cohn (337) ever ask you for financial information about the firm? A. Yes, on many occasions.

Q. What did he ask you? And fix a time if you can. A. Well, Paul Cohn—Paul Cohn came and said—He asked me do I have any statements which I always kept in my desk. He took them home on many occasions, brought them back the next day. What he did with them I don't know, but when he brought them back we never discussed, because I don't know if he knew the questions to ask, but he did take them home with him.

Q. What did these financial statements consist of? A. Profit and loss and our balance sheet.

Q. At what junctures, what intervals? A. Depending upon when I had the last one.

Q. Where were these statements kept? A. I kept them in my drawer in my office.

Q. Which drawer? A. My desk drawer.

Q. Top? Bottom? A. It wasn't a desk drawer. I had a desk without a drawer and I had a little cabinet.

Q. A credenza? (338) A. I don't know about a credenza. I had a series of drawers. Everybody knew where they were. They were never locked.

Q. The drawer was not locked? A. No.

Q. Was the information in that drawer available to anybody who came into your office? A. Yes.

Q. On any occasion do you recall anybody coming into your office, opening the drawer and taking the information? A. Normally they would ask me.

Q. And what was your answer? A. I always gave it to them. There was nothing to hide.

Q. But it was the general knowledge in the firm that the finances were kept in that drawer? A. Yes. Norman Carney had another set, Saluc had another set. I believe Henry on most occasions had another set because we usually made distributions to the executive committee.

Q. These are the gentlemen that comprised the executive committee? A. Yes.

(339) Q. As you know in your experience on the Street, are most firms, member firms, run by executive committees? A. I believe so, yes. In fact, the exchange required that there is a small group to at least run the firm.

Q. Can you give us the reason for that requirement? A. Well, I know in our case, because of the newness of our firm, the exchange at the time that we were organized not only suggested, but their suggestion was well founded, that this would not be a one-man firm. Therefore, an executive committee started out from the outset of our firm. I think there were six people on the executive committee at that time and two had left so it became four.

Q. The financials that you referred to that were in that cabinet drawer, who were they prepared by? A. In the first several—we were in business approximately six and a half years. I think the first five years they were prepared on a monthly basis by our outside auditors, Merskey & Company. They used to come in every month and prepare a financial statement, prepared our certified statements, prepared our quarterly (340) statements, if necessary.

After that we had set up internal controls which our controller, along with the manager of the back office, prepared them. The controller and our manager in charge of operations would prepare them for us each month.

Q. When you say approximately five years, can you be more specific? When did the practice cease? A. The practice never ceased. The practice of preparing financials never ceased.

Q. When did you cease having it done outside? A. When it became too costly and we found we had the same capability internally to do the same job.

Q. Can you fix a date on that? A. I would say we did it for the last two years of our operation. So we were in business up until May of 1970. I would say some time in '68 we had our own internal operations prepare the statement.

Q. Did you still have Merskey & Company as your outside auditors? A. Yes.

Q. They did prepare those statements? A. Yes.

Q. Do you know of any stock exchange requirements (341) for filing financial information by member firms? A. Yes. Particularly during the era of the problems of paper work, the crunch came around in '68, the exchange demanded our financial status on a monthly basis relating to capital, profits and everything relating to our business.

Q. Just your company? A. The entire industry.

Q. In other words, is it fair to say that financials were constantly being prepared in Hertz, Warner & Company? A. On a monthly basis, yes. Certain capital reports. I believe they also went to the Securities & Exchange Commission as well as the New York Stock Exchange.

Q. What relationship did Robert Sadlier have with the preparation of financial information? A. He prepared them.

Q. He was the person in house who was responsible for the preparation of them? A. Of all financial statements.

Q. Now, you said that Paul Cohn did avail himself of these financial statements? A. Yes, he did on many occasions. I don't know (342) what he did with them but he did avail himself of them.

Q. Can you give me specific times when he did take them? A. Well, he did not take them during the time when he was an employee. He took them during the time when he knew he was admitted as a general partner.

Q. When would that be? A. Some time between July, '69 through October, November of '69.

Q. He never asked you for them? A. At the beginning when he was a partner they were always available too.

Q. During the time he wanted to become a partner or the question of his becoming a partner was in force, did he ever ask you for them? A. Not to my knowledge.

Q. Did you ever meet Mr. and Mrs. Fine, Paul Cohn's in-laws? A. Yes, once.

Q. Where was that? A. At Paul Cohn's wedding at the Plaza Hotel.

Q. Did you have any conversation with them? A. Just to say hello and "Thank you for inviting me to the wedding."

(343) Q. Did you discuss the business of Hertz, Warner at all? A. No, I never did with them.

Q. Did you ever after that time ever see them? A. No.

Q. Did you ever have any occasion to speak to them? A. No.

Q. Did you ever write to them. A. No.

Q. Did you have any communication of any form whatsoever with them? A. No.

Q. Now, with regard to the Meyer-Blau group, did there ever come a time that Arthur Meyer—I am talking about

from the spring of 1969 through 1970, we will say to March of 1970—did Arthur Meyer or Joseph Blau or anyone in that group ever tell you that they would not sign the proposed '69 partnership agreement? A. Not to my knowledge.

Q. Did you have negotiations with the Meyer-Blau group during that period of time? A. We had discussions concerning the new agreement of 1969, yes.

(344) Q. Did you sign the partnership agreement, the '69 partnership agreement? A. Yes, I did.

Q. Did you ever make any false representations of fact to Paul Cohn for the purpose of inducing Peerless to put money into Hertz, Warner?

Mr. Genovese: Objection, your Honor. I have been letting the leading questions go but I think this goes a little too far. I object.

Mr. Lipkin: I don't see how that's leading at all, your Honor.

The Court: Well, I'll allow it. I don't know that it's of very large probative value but I'll allow it.

What's the answer?

A. I never led anyone, including Paul Cohn, anyone in that nature, never let anyone fraudulently put money in our firm.

Mr. Genovese: I object to that and move to strike.

The Court: I'll let it stand.

Mr. Lipkin: No further questions, your Honor.

(345) *Cross examination by Mr. Genovese:*

Q. Mr. Hertz, you testified that you regarded yourself as a second father to Paul Cohn, is that the type of relationship? A. In a manner of speaking, yes.

Q. And did you give him confidential advice from time to time? A. I believe I did.

Q. Did you recognize an obligation to him beyond the obligation that you have recognized a normal person in the firm? A. I don't understand your question.

Mr. Lipkin: I object to the question.

Q. You don't understand it, sir? A. No.

Q. Maybe I can put it a little more simply. Would you give him advice or disclose facts to him that you wouldn't disclose to other younger people in the firm? A. I'm not sure I would. It depended upon the person in the firm and the question they might have asked me.

Q. You didn't have any closer feelings for Paul. Was it a one-way-type thing that he regarded you as a (346) father and you just looked on him just as someone else?

Mr. Lipkin: The question was asked of Mr. Hertz on a personal basis.

The Court: That is not a ground for objection. I will allow it.

* * *

A. I regarded Paul Cohn as a friend of mine, not from a social point of view but from a business point of view. We had become close friends over the years, even though he was much younger than myself.

Q. You testified that Mr. Cohn looked at monthly P & L's, is that what he looked at? A. I didn't say he looked at monthly P & L's. When he looked at a statement it was available to him.

Q. What did he look at? A. A statement.

Q. What statement. A. A statement that contained the balance sheets, (347) the months' operation and the cumu-

lative operation for that year. Assuming he looked at it in our six-month, he would have seen the month that he wanted and the five months prior.

Q. Did you get monthly P & L's? A. Yes.

Q. From whom? A. From my back office, from my auditors.

Q. Who were your auditors? A. Merskey & Company.

Q. How did they come to you, sir? A. Usually by mail.

Q. Where did you keep them? A. I have my own set in my drawer.

Q. Did you ever give any to Mr. Cohn? A. Not during the time he was an employee. No.

Q. How about when he was a partner? A. When he asked for them.

Q. You say you never gave him any when he was an employee, is that right? A. Not that I know of, except the controller had one.

Q. Except what? A. Except the controller of our company, who (348) was not a partner, who was an employee, had one.

Q. Did Mr. Cohn ever take any out of your desk? A. Not that I know of.

Q. Do you recall testifying at a deposition, Mr. Hertz? A. I believe so.

Q. Do you recall testifying on November 1, 1971? A. I recall testifying. I don't know if it's November 1st.

Q. Do you recall me posing these questions to you and you giving these answers:

> "Q. Is it your testimony that copies of monthly profit and loss statements of the firm were always available? "A. Yes.

"Q. I see. Can you tell me whether any of the younger partners avail themselves of the opportunity to look at these statements? "A. Yes.

"Q. Who, please? "A. Paul Cohn for one, Bob Sadlier. Bob had it anyway because he was in charge of creating these (349) statements. Paul on many occasions came in and took a copy home with him, read it, brought it back.

"Q. During what period are we talking about? "A. It would have been several times after he became a partner and before. Whenever he wanted one there was always one available?

"Q. Even prior to the time he was a partner? "A. Yes."

Do you recall giving those answers, sir? A. Probably.

Q. Has any thing changed your recollection from the time that you gave that testimony, sir? A. Well, that was the best of my recollection then.

Q. At that time? A. Right.

Q. Your recollection differs now, doesn't it? A. Not really, no.

Q. Did Paul Cohn take monthly P & L statements home before he was a partner? A. I don't recall.

Q. You don't recall.

You did recall then. You said he did. What (350) do you say now? A. I say to you I recall him taking statements during the time he was a partner. If he had taken statements during the time he was an employee that may have been a mistake. I don't know.

Q. Was it a mistake or was that your recollection? A. That was my recollection.

Q. I see. Now, do you recall him taking monthly P & L's at all? A. Yes, on several occasions he did.

Q. Monthly P & L's? A. When you say monthly—

Q. That's what these questions are about. A. I really don't understand what you are saying to me.

Q. You received monthly P & L's, didn't you? You know what I am talking about when I ask you that question, don't you?

* * *

(351) Q. I show you a document dated March 5, 1969. Would you describe that as a montly P & L? A. I would describe this as a statement of operations for the month of January and for the seven months ending January 31, 1969, and the balance sheet and all pertinent financial data contained in here.

Q. Is there a document other than that that would be a monthly P & L? Did you receive something other than that? A. No, these are what I received.

Q. When we talked about monthly P & L's at your deposition, were we talking about this type of document? A. I didn't have two types of document.

Q. We were talking about this then? A. Right.

Q. So you know what I mean when I ask you about monthly P & L's, right? Do you know what I mean? A. Yes.

Q. Okay. Now, that particular document I just showed you, Mr. Hertz, was this prepared by Mr. Sadlier (352) in the back office? A. Let me see.

Q. All right (handing). A. This was prepared by Merskey & Company.

Q. So as of that date, namely, March of '69, they were still preparing your monthly statements, weren't they? A. Apparently, yes.

Mr. Genovese: Your Honor, I offer in evidence a letter dated March 5, 1969, to Hertz, Warner & Company on the letterhead of Robert Merskey with attached financial information.

Mr. Weisberg: No objection, your Honor.

(Plaintiff's Exhibit 28 was received in evidence.)

* * *

(353) *By Mr. Genovese:*

Q. Where did you keep the monthly P & L's, Mr. Hertz? A. I kept my monthly P & L's in my little case behind my desk.

Q. In a case behind your desk? A. It was a series of drawers.

Q. Behind your desk? A. Yes.

Q. Did you keep any in your desk? A. I had a very small drawer like that. There was no room for it.

Q. Do you recall me asking you where you kept them on your deposition? A. If I said I kept them in my desk I was in error.

Q. I see, you were in error. Do you have a recollection of providing Mr. Cohn with a monthly profit and loss statement? A. I have a recollection that Mr. Cohn had come in on several occasions and asked to look at the latest statement which I had in my possession, or whatever (354) latest statement. I gave it to him. He took it home at night or brought it home the next day or kept it a few days. I don't know. It wasn't really important to me at the time.

Q. You can't place any one occasion? A. I can't.

Q. As to when he walks in? A. During the time he was a partner.

Q. Not before he was a partner? A. I don't recall.

Q. Do you recall giving him a P & L before he was a partner? A. No, I don't recall.

Q. You don't recall? A. No.

Q. Now, do you recall giving him one after he became a partner? A. Yes.

Q. How long after, sir? A. I don't recall. It was some time in the time after he became a partner. He was not entitled to have one prior to the time before he was a partner and he wouldn't have asked for one under the circumstances.

Q. He wouldn't have? (355) A. No. No employee ever asked me for a P & L.

Q. When do you say Mr. Cohn became a partner? A. I believe in July 1969.

Q. And prior to that time, say in May of 1969, if he asked you for a monthly P & L would you have provided him with one? A. Well, knowing that he might be proposed for a partner I would have given it to him, surely.

Q. He didn't ask you for one at that time? A. No, not that I recall.

Q. Did you tell him how the firm was doing at that time? A. I don't recall talking to him about it.

Q. You don't recall talking to him about him becoming a partner? A. Yes.

Q. In any of those conversations did he discuss the financial operations of the firm with you? A. Not with me, no.

Q. And you never told him anything, did you? A. I only told him if he asked me.

Q. You never told him anything about the financial operations of the firm, did you? A. I don't recall.

(356) Q. You don't recall? A. No.

Q. What do you recall telling him, sir? A. Well, I don't know what you are asking.

Q. I am asking you what you recall telling him in your conversations with him about him becoming a partner. A. Well, when he first told me about the factor that he was planning to become a partner again I was very pleased and I told him that I was happy that he made the decision to do it.

Q. That's all you recall telling him? A. That's all I recall telling him.

* * *

(357) *Cross-examination continued by Mr. Genovese:*

Q. Mr. Hertz, when for the first time did you learn that the capital contribution that Mr. Cohn was to make was to come from Peerless? A. I believe that it was some time in 1969.

Q. Well, can you place it any more specifically than that, sir? A. Not really. Some time in 1969. I don't recall.

Q. You know before the capital came in the firm that it was coming from Peerless, didn't you? (358) A. Yes. When Paul got married he suggested to me if I wanted some substantial money he probably could get it from his father-in-law. So I presume at that time that whatever capital contribution he was going to make would be coming from his father-in-law.

Q. You weren't told that though? A. I was told by Paul.

Q. When? A. I said some time in 1969. I don't recall the exact month and the exact date.

Q. Before July 1st, sir? A. I wouldn't know.

Q. You have no way of recalling? A. No, not at all.

Q. You knew before October, '69, didn't you? A. Yes, I knew before October, '69.

Q. How about September, did you know before September, '69? A. I don't remember. But I knew before October because I think in October was when the securities came in.

Q. Mr. Hertz, do you remember the securities loan agreement that was executed by Paul Cohn and Peerless? A. I recall that, yes. I mean I don't know if (359) I read the entire agreement but I recall it. It has been talked about so it has refreshed my memory.

Q. What were the circumstances of the execution of that agreement which has been marked Third-Party Defendant's Exhibit B in evidence? A. I don't quite understand your question.

Q. Do you recall having any discussion with anyone concerning the preparation and execution of that document? A. I don't know if I recall having a discussion with Paul. I might have had a discussion with Joel Held who was our house counsel who handled the mechanics of bringing the securities in.

Q. But you recall no discussion with anyone about it? A. I said I may—

Q. I am asking for your recollection, not your speculation. Do you recall? A. I can't answer the question any better than I have just given you.

Q. So you don't recall, is that correct? A. I said if I had a discussion it—

Q. I don't want to know that. I want to know what you recall. Do you recall having a discussion with Joel Held about Exhibit B? (360) A. Not that I know of.

Q. Do you recall having a discussion with Paul Cohn about it? A. Not that I'm aware of.

Q. Do you know whether the document was ever sub-

mitted to the New York Stock Exchange? A. Joel Held told me it was.

Q. Do you know, sir? A. I only can tell you that Joel Held told me it was. I never submitted it personally, no. That wasn't my function.

Q. Did there come a time, Mr. Hertz, when you learned that the stock exchange questioned Mr. Cohn's contribution of 2000 shares of AT&T stock as being good capital? A. Well, that's a misnomer. I would like you to define—

Q. Just answer my question, sir. A. Just a second. What is good capital?

Q. Have you ever heard the term used before? A. It's a technical term used by the exchange but not by our balance sheet.

Q. Do you know whether the exchange ever requested documentation with respect to that loan? A. I had heard that they had, yes.

(361) Q. Who did you hear it from? A. I believe Bob Sadlier.

Q. What did you say to Mr. Sadlier and what did he say to you? A. That the exchange was asking for additional information.

Q. Do you know the type of information? A. I don't recall exactly, other than some information that the exchange was seeking in order to set forth the 2,000 shares as what they construed as good capital.

Q. I show you what has been marked Plaintiff's Exhibit 3 in evidence and direct you to page 2 thereof, the last paragraph on the exhibit, and ask you whether that refreshes your recollection. A. Page 2, paragraph what?

Q. The last paragraph on page 2. A. Starting here (indicating)?

Q. Yes, sir. A. This went directly to Bob Sadlier, not to me.

Q. I understand it went to Mr. Sadlier. Does it refresh your recollection as to whether or not the exchange questioned Mr. Cohn's capital contribution? A. Well, according to this letter apparently they questioned Paul Cohn's contribution.

(362) Q. You weren't shown the letter at the time it was received? A. No.

Q. Did you ever see the letter before today? A. I might have seen the letter some time way after everything was done, but during the time of May, 1970 I never saw this letter.

Q. Does that refresh your recollection as to whether the exchange received documentation on the loan between Peerless and Cohn? A. No.

Q. It doesn't? A. No.

Q. Do you recall whether there was another letter from the exchange dealing with Mr. Cohn's capital contribution? A. There might have been?

Q. Do you recall whether there was? A. I don't recall.

Q. I refer you to Plaintiff's Exhibit 4 in evidence and ask you if that refreshes your recollection, sir? A. No. These are all mechanical things handled by Robert Sadlier, who was in charge of all the correspondence between the New York Stock Exchange and our (363) back office.

Q. And he never discussed it with you? A. He might have. It was not an important matter that couldn't be resolved between Bob Sadlier and the New York Stock Exchange.

Q. Is it a fact that the exchange required documentation on certain loans before they could be regarded as "good capital" within the rules of the exchange? A. For their purposes, yes; for my purposes, no.

Q. You didn't concern yourself with that matter? A. I didn't concern myself with the matter. I thought that Mr. Held, who was an attorney, and if he could discharge his duties properly, would have taken care of it.

Q. Mr. Held didn't discharge his duties properly? A. It was his duty.

Q. I'm asking you, did he discharge them properly? A. I don't know. Apparently not if the exchange did not approve it.

Q. As of the time May, 1970, when Plaintiff's Exhibits 3 and 4 in evidence were received, had a signed partnership agreement been filed with the exchange? A. I'm sorry, I didn't hear it.

(Question read.)

(364) A. I was only told what Mr. Held advised me, that he had filed with the exchange the signatures that he apparently received from the various people who did sign. I was always under the impression that a partnership agreement was filed with the exchange.

Q. Signed by all the partners? A. No.

Q. You know as of this time no one has ever been filed signed by all the partners, don't you? A. I don't know that?

Q. You don't know that? A. No.

Q. You don't know that certain partners didn't sign the partnership agreement. A. I know that certain partners did not sign.

Q. I see. Going back to Exhibit B again, Mr. Hertz, that's the securities loan agreement between Peerless Mills and Paul Cohn, have you ever seen agreements similar to this in your experience at Hertz, Warner? A. I can't tell from here.

Q. Look at it (handing). A. This was a formality that existed with all our—anybody that borrowed securities from another source where they were contributing capital to use where the money was (375) coming from a third party, and this happened with many, many of our limiteds and subordinate lenders who put money in over the years.

Q. I take it the answer to my question is yes, is that right? A. I never really got into that phase of the business, Mr. Genovese.

Q. Did you ever have an agreement such as this? A. Did I have an agreement like that?

Q. Yes. A. I might have.

Q. With whom? A. Possibly with my wife, I'm not sure.

Q. You don't remember though? A. I said possibly. I'm not sure.

Q. Do you remember whether you had such an agreement? A. I don't recall.

Q. You don't recall? A. No. I think there was a time but I'm not sure because it was a little ambiguous as to whether my wife was going to be a subordinate lender, which she never did, and I had checked with the exchange and she had never been approved a subordinate lender. I really can't tell (376) you for sure whether I actually signed or she signed an agreement such as that. There may have been one in existence.

Q. You have no specific recollection though? A. At this moment, no.

Q. I see. Mr. Hertz, can you tell me, was there a procedure within the firm of Hertz, Warner as to how agreements of this type were terminated? A. Based on the termination of the loan, based on a date, I guess. Either the loan agreement was for a year, two years, six

months, and at the end of the term of the loan it was terminated. If the individual decided to reinstate their loan, they would extend the term of the loan.

Q. Let's assume that the lender wanted to terminate the agreement, could he do so upon notice? A. Yes.

Q. So Peerless could have terminated this agreement by notifying Hertz, Warner & Company that it elected to terminate; is that what you are saying? A. No, we had no agreement with Peerless Mills at all.

Q. What about your wife, did she ever terminate one of these? (377) A. Yes.

Q. She did? With whom? A. If she signed one, if I signed one she would have terminated the agreement with the firm itself.

Q. Do you remember her terminating it? A. There was a moment in time that—and I believe this to be correct but I'm not sure, that she was planning to become a subordinate lender. Prior to the time that the subordinated agreement was approved and posted by the exchange she had notified the firm of Hertz, Warner & Company, which in turn Joel Held notified the exchange that the subordinated agreement would be cancelled.

Q. Is this a subordinated loan agreement? A. I don't think so.

Q. Was the one your wife entered into a subordinated loan agreement? A. It would have been.

Q. I want to know, do you remember it, sir? A. I can only tell you what I know.

Q. Did you ever see this document (handing)? A. This is the subordinated loan agreement.

Q. That's a subordinated loan agreement? A. Securities loan agreement between my wife and myself.

* * *

(380) Q. Mr. Hertz, do you recall what the profit was for Hertz, Warner for the fiscal year ending June 30, 1968, approximately? A. Approximately $2½ million.

Q. And do you recall what the profit was for the six-month period ending December 31, 1968, approximately, again? A. About 100,000, $94,000 to $100,000.

Q. December 31, '68, six months ending December 31, 1968. A. About a million dollars, I guess.

(381) Q. And do you recall what the final figure was for the year ending June 30, 1968? A. About 100,000.

Q. Now, during the months February, March, April, May and June, 1969, do you recall whether Hertz, Warner suffered operating losses? A. That's very difficult to tell on the basis of what you just termed as operating losses.

Q. Did they suffer losses which— A. They suffered losses but I couldn't possibly tell you at this time whether those were truly operating losses.

Q. Did the monthly P & L's show losses? A. On the basis of losses, yes.

Q. Did you ever tell that to Mr. Cohn? A. I don't know. I really don't know.

Q. Now, you were a partner under the 1968 partnership agreement were you not? A. Yes.

Q. What was your capital contribution under that agreement? A. I believe $750,000.

Q. What was your capital contribution under the 1969 agreement? (382) A. I believe $550,000.

Q. Can you tell me when it was that it was decided that your capital contribution would be reduced? A. Well, when the new agreement was drawn up and the capital contributions of certain partners were to be brought up to is shown on the basis of the 1969 agreement, that is when it was agreed upon that certain people would be at certain levels.

Q. October, November, 1969. A. Whenever it was.

Q. I don't want to know whenever it was. A. I don't recall the date but it was before the agreement was drawn. So whenever that first draft was drawn, if there is such a record, that's when it was understood what various people's capital contribution would be.

Q. Did you discuss this with anyone? A. Surely.

Q. With whom? A. Mr. Warner, Mr. Carney, Mr. Blau, Mr. Meyer, Mr. Schiff. It had a formula. It was not something that was grabbed out of the air.

Q. Did you discuss it with Mr. Held? A. He had to know. He typed it up himself.

(383) The reasons for it? A. I might have.

Q. Now, going again to Plaintiff's Exhibit 1 in evidence which is the partnership agreement of July 1, 1969, when were your first discussions with Mr. Meyer and Mr. Blau concerning their participation in that agreement? A. It was some time after July, 1969.

Q. After July, 1969? A. I believe so.

Q. Did those discussions result in any changes to any drafts in the agreement? A. Yes, I would say yes.

Q. And did those discussions reflect the adoption of proposals by Messrs. Meyer and Blau in the agreement? A. In my discussions with Mr. Blau and Mr. Meyer and Mr. Schiff after my meeting with them, which I made pencil notes to the changes that would take place concerning their participation, their capital contribution, and mine, I related this to, I believe, Mr. Warner as to what their new participation would be and I also related this to Joel Held.

Q. And do you know whether they did anything about it? (384) A. Well, I know Joel drew up a draft. There were a number of errors in the draft, the first draft, but that's the way it was left the first time around.

Q. And were there any points covered in your discussions with Messrs. Meyer and Blau which were not reflected in Plaintiff's Exhibit? In other words, were there any changes suggested by them that you did not tell Mr. Held to incorporate in Plaintiff's Exhibit? A. Well, my initial discussion with Messrs. Meyer, Blau and Schiff related to primarily a redistribution of points on the basis of Mr. Warner, myself and the three of them on the basis that we would construe our capital contribution on the basis of $50,000 per point. This is how we came up with $300 for six each for Mr. Blau and Mr. Meyer, and 100 for Mr. Schiff, and that's how I got the 550 for me, because I had 11 per cent of the firm; that's why Mr. Warner got 550, because he had 11 per cent. Mr. Meyer and Blau had part of the corporate affiliation, 100 per cent of the A stock. Because of the differentials of various compensation they wanted additional compensation through some source which was a little difficult to work out and we agreed upon that they would get an increase in their percentage points at Hertz, Warner without increasing their participation in the affiliate. That's how this conversation came about.

(385) In addition to that they were to be deemed, although the word in there special limited partners— they were to be deemed as limited partners who would share the same loss ratio as the general partners, the three of them. That was the end of the discussion. That's how this whole agreement started.

Q. What happened next? A. Joel Held prepared the agreement. It was sent up to Meyer and Blau for their review. There were several other changes that had taken place because apparently Mr. Meyer's capital contribution, including Mr. Blau, was to be readjusted with his wife and Mr. Blau's son.

What occurred was that Mr. Held had left Sydelle Meyer, Arthur Meyer's wife, the same as the original agreement and increasing Mr. Meyer's account. So in effect he had to put up another 150,000. We agreed that 550,000 would be contributed between Mr. Meyer and his wife. The way the agreement read it looked like it was about six or seven hundred thousand dollars and it was incorrect.

Q. So Plaintiff's Exhibit 1 was incorrect? A. I really didn't read that. You are saying it is incorrect. I don't know whether that's incorrect or not, Mr. Genovese. All I can tell you is what happened (386) with myself and Mr. Meyer because I handled the total negotiations with Mr. Meyer and Mr. Blau for the firm.

Q. Did you ever read Plaintiff's Exhibit 1 before you signed it? A. If I did I don't recall it.

Q. You don't recall reading it? A. I don't know what that agreement calls for now. It was several years ago. If you want to give it to me I will refresh my memory.

Q. Take a look at it (handing). A. I'm only going to refresh my memory concerning the capital structure.

This was incorrect. In here it says Sydelle Meyer shows a capital contribution of 440,000 and Arthur Meyer 300 and the total capital contribution should have been 450.

Q. Did you ever tell Mr. Cohn that was incorrect? A. This wasn't shown to anybody that I'm aware of because this was either the first draft that Joel had prepared.

Q. Isn't in fact the copy that went out for signature and was signed? A. I don't know.

Q. You don't know? (387) A. There was a misunderstanding.

Q. Misunderstanding as to what? A. As to the capital contributions of these individual people concerning Mr. Meyer's wife.

Q. Isn't that an exact copy of what you signed? A. I don't know.

Q. After that, Mr. Hertz, when was your next discussion with Messrs. Meyer and Blau? A. I guess—I can't put a date on it. I did discuss the partnership agreement prior to the time he went to Switzerland, I know that. That was the last discussion I had with him before he left the country.

Q. Did Mr. Meyer ever present to you a proposal with which you would not agree? A. Yes.

Q. When was that? A. It's my best recollection that it was after January of 1970, upon his return from Switzerland, back to the United States.

Q. Did you see a copy of the memorandum that's been admitted in evidence as Plaintiff's Exhibit 19? A. Yes, I saw a copy of this.

Q. At or about the time it came into Hertz, Warner? A. I believe so. I don't know when it came in.

Q. Did you tell Mr. Meyer that you absolutely would not agree with his proposal? A. No, I did not.

Q. You did not tell him? A. No.

Q. Did you tell anyone else in the firm that Mr. Meyer presented a proposal with which you would not agree? A. That's the question you asked before. I spoke to Mr. Meyer and we agreed on most points with the exception of one.

Q. Did you tell anyone else of that? A. I don't know if I told anybody else but I told Mr. Meyer and Mr. Blau.

Q. Did you tell anyone that you thought Mr. Meyer would sign the agreement? A. Oh, yes, absolutely.

Q. All the way along? A. As far as I knew, yes.

Q. Did there come a time when you thought he wouldn't. A. No, not that I know of.

Q. As far as you knew, right along Mr. Meyer was

(389) going to sign the agreement? A. Yes. He was a very responsible person.

Q. And there never came any point in time when you thought he would not sign? A. Not during my time. He's been in the firm too long for him to withdraw. I could never believe he would have. He brought in too much money to our firm to do that.

Q. Did you ever receive correspondence from him? A. No. The only thing I received in the negotiation with that document and the one point that disturbed me greatly was the point that he suggested that in the event the limited partner's capital depreciated due to market valuation, that they would not have to make it up, and if the general partner's capital contribution would depreciate they would have to make it. It was an unfair proposal for the general and I don't believe the stock exchanges would have accepted such a proposal.

Q. Mr. Meyer never told you orally or in writing that he wouldn't sign the agreement? A. He wanted this done but we never got to that point that I am aware of. Q. You received a letter from Mr. Meyer, did you not? (390) A. I don't know whether I received a letter.

Q. I show you what has been marked Plaintiff's Exhibit 25 in evidence and ask you whether you received that letter. A. This is after the firm—

Q. Did you receive that letter? A. I might have, yes.

Q. You might have? You don't recall receiving it? A. I probably did. I'm not saying I didn't.

Mr. Lipkin: May I see the letter for a moment, your Honor?

The Court: Yes.

A. I think we got a lot of letters from everybody.

Mr. Lipkin: Thank you.

Q. Is this the first notice you received from Mr. Meyer that he regarded his participation in Hertz, Warner under the July 1, 1968 agreement and not the 1969 agreement? A. I don't know if I received any notices to the extent of writing. I know we discussed it greatly during this trying period after we went into liquidation around May of 1970. That's dated July, 1970, which is two months after we stopped doing business.

(391) Q. Did you have a meeting with Mr. Meyer on April 3, 1970? A. I might have.

Q. Well, does this refresh your recollection? A. Is this April 30th?

Q. Read the first paragraph of the letter. A. I don't know if I got the April 30th memorandum.

Q. You don't. You don't know whether you got that letter either? A. I probably did. I'm not denying that it didn't come in because I think all the limiteds and subordinate lenders advised us they were withdrawing after we went in liquidation.

Q. Didn't it come as a shock to receive that letter if that's the first you heard that Mr. Meyer wasn't going to sign the agreement? A. Why was it a shock? We weren't in business. They wanted their money back. I didn't blame them. I was no longer in business.

Q. What about on April 3rd, were you in business then? A. We were in business on April 3rd.

Q. You were? (392) A. Yes. But I don't believe he was withdrawing his capital as of April 3rd.

Q. Were you ever told, Mr. Hertz, that the stock exchange was requesting a signed copy of the July 1, 1969 partnership agreement, Plaintiff's Exhibit 1 in evidence? A. Well, they always requested when we didn't get the agreements in on time. It was a history—

Q. Were you told that fact? A. No, not that I know of, that fact.

Q. Did you ever see Plaintiff's Exhibit 9 in evidence before? A. No.

Q. Did you ever see Plaintiff's Exhibit 10 in evidence before? A. No.

Q. And did you discuss with anyone at Hertz, Warner the demands by the stock exchange for a signed copy of the partnership agreement in February and April, 1970? A. Did I discuss it?

Q. Yes, did you discuss it? A. Well, this was normally handled between the exchange and—

Q. I'm asking whether you discussed it. (393) A. I don't believe so. I might have discussed it with Joel Held.

Q. Do you have a recollection of that? A. Not necessarily because we were then working on the agreement. I wasn't concerned about the exchange.

Q. You weren't concerned about the exchange? A. No, because this is a formality that has to be done. Until we got it done—

Q. How were you going to comply with that formality, did you have everyone's signature on the agreement? A. We didn't.

Q. Then what was it? A. We filed what we had.

Q. I see. Did there come a time, Mr. Hertz, in the fall of 1969 when you received notice that limited partners and subordinated lenders were withdrawing from the firm of Hertz, Warner? A. Notice from whom?

Q. From them. A. We had certain limiteds going out and we had new ones going in. This was the nature of our business.

Q. And was going in and going out any greater in 1969? In other words, were more going out? (394) A. I couldn't tell you.

Q. You don't know? A. I said I couldn't tell you.

Q. Do you recall the stock exchange saying anything about the withdrawal of certain limited partners and subordinated lenders? A. To me personally, no.

Q. To Hertz, Warner? A. Possibly. They were always concerned about capital of their member firms. We had to satisfy them that we had ample capital to operate our business.

Q. Do you recall whether the stock exchange wrote to Hertz, Warner that there was a substantial adverse change in the capital ratio of the firm in January, 1970 which was due primarily to the retirement and withdrawal of limited partners and subordinated lenders, capital of approximately $2 million? A. Possibly.

Q. I show you Plaintiff's Exhibit 3 in evidence and ask you if that refreshes your recollection. A. I didn't see this but I'm sure that Mr. Sadlier must have talked to me about it.

Q. You have no recollection of that conversation? (395) A. Well, we always discussed capital. I don't know if it was that particular conversation but he was in charge of preparing all these reports to the exchange and answering that memorandum. He would have answered that.

Q. Do you know how a limited partner would withdraw from the firm? A. By notification.

Q. How soon in advance? A. I believe our agreement—limited partnership agreement—at one time it was a three-month notification and we might have extended it to six months, I'm not sure.

Q. If a limited partner was going to withdraw and notified the firm, would you know about that? A. Yes.

Q. So you had to know at least three months prior to January, 1970 that limited partners representing capital of $2 million were leaving the firm, is that correct? A. Yes, but it didn't disturb me.

Q. But you knew it? A. Yes.

Q. Did you tell anyone that? A. Tell who? My partners?

(396) Q. Did you tell Mr. Cohn? A. Mr. Cohn? I don't know that I discussed it with Mr. Cohn. I really don't know.

Q. Mr. Hertz, after October, 1969, to your knowledge, did any general partners withdraw capital from their capital accounts? A. They might have.

Q. Don't you know? They might have, don't you know? A. I believe that—I don't know if it was withdrawal but there might have been one or two cases where a general partner required some money that it was withdrawn but I don't know exactly the month. I know that in Henry Warner's case there was some withdrawal but I don't know of anybody else.

Q. You don't know of anyone other than Mr. Warner? A. Apparently you do. I don't recall.

Q. You don't? A. No.

Q. How much did Mr. Warner withdraw? A. I don't know exactly.

Q. Approximately. A. I really don't know. I'd rather him speak for himself, if you don't mind.

(397). Q. You have an idea, don't you? A. No, I really don't know the exact amount.

Q. I know you don't know the exact amount. You have an idea in round numbers, don't you? A. About $30,000, approximately.

Q. That's all? A. As far as I know, yes.

Q. Didn't you tell Mr. Held to write him a letter about a certain withdrawal? A. That was not a withdrawal. I got the wrong information.

Q. You did? A. Yes.

Q. What was it? A. It was a substitution of his capital.

Q. How much was Mr. Warner's capital account down at the time he left the firm, how much was it under capital? A. When he left the firm it was under, I guess, about $350,000.

Q. Out of a total contribution of $550? A. Yes, but that's not what his capital account was when he made the substitution.

Q. That was his deficit when he left the firm, is (398) that right? A. I believe in June, I'm not sure of the figure, but I think that's what the figure was.

Q. You know in round numbers what the figure was? A. I believe that is correct.

Q. You got notes from Mr. Warner, didn't you? A. I have one note that his capital account was now $450,000.

Q. In part that reflected withdrawals, didn't it, sir? A. It reflected a withdrawal, as I mentioned before, about 20 or 30 thousand dollars.

* * *

(401) *By Mr. Genovese*:

Q. Did there come a time, Mr. Hertz, when Mr. Cohn at a partnership meeting called for partners to come up to capital as required by the July 1, 1969 agreement? A. I don't know.

Q. You don't know. You don't have any recollection of him making such a statement? A. He may have made a statement as such.

Mr. Lipkin: Can we fix the time?

The Court: Mr. Hertz, will you talk a little louder because I can't hear you.

The Witness: I said it may have been said at a meeting but I don't recall when.

The Court: Are you saying it was said and (402) you don't remember when?

The Witness: It may have been said but I don't remember when.

The Court: I think really you ought to stop telling us what may have been. If you don't know, say you don't know. If you do know, say you know. Just tell us what you remember.

The Witness: I believe it was said.

Q. You believe it was said? A. Yes.

Q. What did you say to him when he said it? A. That I don't recall.

Q. Do you recall saying anything to him? A. No.

Q. Do you recall Mr. Cohn making a request that his capital contribution in AT&T stock be returned to him and that he give a personal note for that? A. Yes.

Q. Do you recall saying anything to him on that?

Mr. Lipkin: Can we fix a time on this? I am having trouble following it.

The Court: Do you want to see if Mr. Hertz knows when this happened.

Q. When was it, sir? (403) A. A calculated guess would be some time in 1970.

Q. January ? A. Possibly.

Q. February? A. Possibly.

Q. March? A. Possibly.

Q. April? A. I don't know beyond that.

Q. May? A. No. May we were already out.

Q. May, possibly? A. I don't think so. It may have been. I don't know. I know it was said.

Q. What did you say? A. It was impossible to do it.

Q. Why was it impossible to do it? A. Because he was a general partner.

Q. And as a general partner he couldn't give a notice? A. We couldn't return all his money for him to put in a note.

Q. That was never done with any other partners? A. Not that I know of, not on full capital, no.

(404) Q. Had you returned Mr. Saluc's money? A. Yes, because he was retired in December, 1969 upon the sale of our office at 2 Broadway to Walston & Company and he went with the sale.

Q. His full money? A. Yes.

Q. Now, Mr. Hertz, did there come a time when the AT&T stock, which was placed in Mr. Cohn's capital account—and I am not referring to the specific shares or any shares—2000 shares of AT&T stock, were sold by Hertz, Warner? A. Yes.

Q. When was that, sir? A. I believe it was some time in the latter part of 1970.

Q. Do you recall how much they were sold for? A. I guess the stock at that time was selling for approximately $47 and change. Probably about, maybe, 90-some-odd thousand dollars; maybe a little bit less. I don't recall.

Q. Do you recall what happened to the proceeds from that sale? A. It went into the funds of Hertz, Warner & Company, with all the other remaining assets.

Q. Did your wife review any of the proceeds? (405) A. My wife receive any of what proceeds? Of the assets of Hertz, Warner & Company?

Q. Yes. A. Absolutely no.

Q. On the day the stock was sold did your wife receive a check for $40,000?

Mr. Lipkin: I object, your Honor. I can't possibly see the relevance of this. We have already been through the business with Mr. Hertz and his wife and you have excluded that.

* * *

The Court: No, objection sustained.

* * *

(406) Q. Prior to the time Mr. Cohn signed the partnership agreement, Mr. Hertz, did the firm release Mr. Saluc? A. We released him—

Q. Yes or no, if you please. A. Yes.

Q. Did you tell Mr. Cohn that you had released Mr. Saluc? A. Everybody was aware of it.

Q. Everybody was aware of it? A. Including Mr. Cohn.

Q. And aware of the documentation affecting that, sir? A. Yes, because the documentation for all releases were identical, for any partner, any general partner.

Mr. Genovese: Mark this as Plaintiff's Exhibit 32, please.

(Plaintiff's Exhibit 32 was marked for identification.)

Q. I show you Plaintiff's Exhibit 32 for identification, (407) Mr. Hertz, and ask if you have ever seen that document before. A. I must have. I signed it.

Q. And is this similar to every document when someone leaves the firm? A. Basically to the extent of their financial obligation to the firm.

Q. Did Mr. Saluc have a continuing financial obligation? A. Only to the term of his employment as a partner. From the time he started to the time he ended. If anything occurred during that period of time he would so be charged.

Q. Didn't Mr. Saluc leave at about the time this document was executed? A. He left in December of '69.

Q. At that time did you return his capital contribution pursuant to that agreement? A. Yes.

Mr. Genovese: I offer Plaintiff's Exhibit 32 in evidence, your Honor.

Mr. Lipkin: No objection, your Honor, subject to connection.

* * *

(408) (Plaintiff's Exhibit 32 was received in evidence.)

* * *

(410) *Redirect examination by Mr. Lipkin:*

* * *

Q. Did you distinguish between what the New York Stock Exchange considers to be good capital and what a brokerage company, a New York member firm, would consider capital for its balance sheet?

Mr. Genovese: Same objection.

Mr. Lipkin: Mr. Genovese on cross examination brought out the distinction himself. Mr. Hertz answered that there was a difference between what good capital requirements were for the stock exchange and what good capital for a balance sheet was, and I think—

(411) The Court: I will allow it.

You may answer.

A. The relationship of good capital as it is described by the New York Stock Exchange is that which is usable capital above fixed assets. A seat, the purchase of a New York Stock Exchange seat is not good capital as far as the New York Stock Exchange is concerned.

Q. Is it an asset as far as a partnership is concerned? A. An asset as far as Hertz, Warner & Company. Anything on a blance sheet that consists of an asset is good capital for our purposes as it relates to third-party creditors or other creditors. Furniture and fixtures are good capital as far as we are concerned. It has a value.

The definition of good capital, as relates to the New York Stock Exchange, is that which you can use for borrowing—for the purpose of borrowing on customers' security purchases.

Q. The question of profitability of Hertz, Warner, before that Hertz, Neumark & Warner, up until the final year of business did Hertz, Warner have a profit every year? A. Yes.

(412) Q. Had the profits increased each year? A. Substantially from our first year in business.

Q. And culminating with what year were the profits the highest or what year were the profits the highest? A. 1968.

Q. How many limited partners were proposed in the '69 agreement? A. '69, I don't recall offhand. Many, 30, 40, 50.

Q. That substantial a number? A. A hundred the previous year. I don't recall the exact number.

Q. Of those partners, of those limiteds, some did not sign, is that correct? A. A few, yes, several.

Q. Now, with regard to the accounting basis upon which Hertz, Warner was, you were on a fiscal basis? A. Yes, June 30th.

Q. A yearly basis. A. A fiscal is any time other than December 31st.

* * *

(413) At what point in time would you know the total profitability for the preceding year? A. About two to three months after the year ended.

Q. Which would be June 30th? A. No. If the year ended June 30th we would not know the total profitability of the firm until about September.

Q. If a limited partner would withdraw from the firm and do it by way of notice, who would receive the notice? A. Probably if I brought him in I would get the notice. If Mr. Warner brought him in he would probably get the notice. Depending upon the individual, I think, that first introduced the limited partner to the firm.

Q. Do you recall what limiteds during the year 1970 sent you a notice directly, gave you a notice directly? (414) A. No, but I'm sure many did. We were the managing partners so normally they would send it to me, copy to Mr. Warner, or vice versa, Mr. Carney.

* * *

HENRY WARNER, called as a witness by third-party defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Weisberg:

Q. Mr. Warner, please state your address for the record. A. 39 Fairfield Terrace, Short Hills, New Jersey.

(415) Q. Give us briefly your educational background, please. A. College graduate.

Q. What college? A. MIT.

Q. And after graduation from college when was the first time you were employed in the securities industry? A. Four years after college.

Q. When was that? A. That was 1952. I graduated from college in 1948.

Q. Where were you employed? A. Merrill Lynch, Pierce, Fenner & Beane.

Q. What did you do there? A. Trainee and then I became a registered representative.

Q. After you left Merrill Lynch where were you employed then? A. I was associated with Merrill Lynch for two years and in 1954 I moved to Heller & Meyer.

Q. How long were you there? A. I was there for a period of six years.

Q. What job or what was your employment there? A. I was a registered representative.

(416) Q. And after you left that firm where did you go after that? A. I moved to Hirsch & Company as their branch office manager in Newark, New Jersey.

Q. What year was that? A. 1960.

Q. And how long were you their branch manager? A. For a period of three years.

Q. That would be 1963? A. Actually, January 1, 1960 is when I began with Hirsch and I ended December 31, 1962.

Q. After that did you work for anyone else? A. No, I did not. I became an allied member with a member firm.

Q. What firm was that? A. Lieberbaum & Company.

Q. How long were you with them? A. For a period of approximately nine months.

Q. And what were your responsibilities with this firm? A. I was the resident partner of the Newark branch office.

Q. And when did you leave this firm? A. I left that firm in October, 1963 to form what was then known as Hertz, Neumark & Warner.

(417) Q. You were one of the founding partners of that firm? A. That is correct.

Q. What were your responsibilities with the firm when it started? A. I was the manager and resident partner of the Newark branch office.

Q. Did there come a time when you moved into Manhattan? A. Yes.

Q. When was that? A. That was July 1, 1964.

Q. And what were your responsibilities once you came to the New York office? A. I became the partner in charge of the production of the firm, the sales of the firm.

Q. Did you have any other responsibilities? A. Yes, I did.

Q. What were they? A. I was the partner in charge of the training program and the research program.

Q. In your capacity of being in charge of sales and production did you work with Paul Cohn? A. Yes, I did.

(418) Q. And when did you first start working with him? A. I met Paul on our opening date—night for the first time, October, 1963, and I perhaps for that first nine-month period of time visited New York on two or three occasions. But starting July 1, 1964, in the course of my work I saw Paul Cohn on a constant basis.

Q. Where was your office and his office in relation to each other as of July, 1964? A. My office was right off the board room with a glass front and an open door, and Paul, as I recall, sat at a regular desk as the registered reps would have in the open board room.

Q. I see. And from 1964 upthrough—when did you leave the firm of Hertz, Warner? A. Well, we stopped doing business as Hertz, Warner in May—the end of April, 1970.

Q. So between 1964 and 1970 did you work fairly closely with Paul Cohn? A. Yes, I did.

Q. How often would you communicate with Mr. Cohn? A. Several—many times a day. I saw him on a constant basis.

Q. And did you see him socially? A. On several occasions.

(419) Q. Was he invited to your home? A. I believe I invited him to my home. I believe we met in Florida one time. I was invited and attended his wedding.

Q. Did there come a time in 1969 when the issue of Paul Cohn's partnership in the firm came up? A. Yes, it did.

Q. Can you describe how that issue arose? A. Well, I'd like to just go back a bit and also indicate that one of my additional responsibilities was the area of syndication, and in that connection Paul Cohn had performed very well for the period that I can recall starting the beginning of 1968 through the 1969 period, and we worked on a very close basis, particularly during that period of time, and on no one specific meeting that I can name, but it did come to pass that Paul Cohn indicated to me that he would like to become a partner again.

Q. And what was your reaction? A. I thought that was a proper thought on his part. He had performed extremely well and conducted himself in a manner that I would expect a partner to conduct himself and I felt favorably toward his idea.

Q. Did you report the substance of this conversation to anyone? (420) A. Yes, I reported it to the executive committee when we next met.

Q. And what was the reaction of the executive committee to the suggestion that he become a partner? A. They responded favorably.

Q. Can I ask you, what was the basis upon which partners were chosen for the firm? I'm referring to general partners. A. General partners were chosen only on one basis, and that is their talent, their ability, that which they could contribute to the growth of the firm.

Q. And in your opinion and the opinion of the executive committee Paul Cohn measured up to this standard that you had set? A. Yes, he did.

Q. What was Paul Cohn's responsibility in the spring of 1969? A. He was responsible for our syndicate department.

Q. Was he the only one who was doing syndication at this time? A. Well, he had a secretary who was quite efficient as well, but it was Paul's responsibility.

Q. Can you describe what syndication is? I (421) don't think it has been brought up in this case yet. What exactly is meant by syndication? A. Underwritings can occur in one of two forms. One, a primary underwriting when an issuing company is selling securities to raise capital, and/or it could occur when a block of stock that is already outstanding, that the sellers are looking to distribute it at one price at one time. There also in the same area could be unregistered offerings which would be spot secondaries.

So in this whole area the Wall Street population refers to it as the syndicate department.

Q. What exactly did he do—I am assuming we are referring to large blocks of stock, is that correct? A. Yes.

Q. What would his responsibilities be with regard to a large block of stock? A. For the most part, most of the underwritings that we participated in were originated by other firms and Paul Cohn developed relationships with other firms and thereby we were invited in when they had securities for sale. Paul, who came up from the ranks and

knew the registered rep mentality and what could sell, had a sixth sense about the proportions of stock to take down and what he thought we could properly sell within the (422) framework of our organization.

Q. Did you consult with Mr. Cohn prior to accepting a block of stock for syndication? A. Most of the time Paul Cohn would operate independently and make judgments himself. We had this type of confidence in him.

Q. He would report to you what he decided or what he found out? A. That is right. Mr. Cohn was very well organized and initiated a reporting system whereby he reported an underwriting when it occurred and then a cumulative result for a month's time.

Q. I see. Was it his responsibility also to distribute this stock to the branches of Hertz, Warner? A. Yes, it was.

Q. And then it was filtered down to the registered reps and they would offer the stock for sale? A. Yes. The line of communication would be Paul Cohn to the branch manager to indicate he had a participation in XYZ Company and asked them what they thought they could use by way of numbers of shares in their branch. He also had the responsibility of making fair allocations when he had greater interest, if he underestimated the demand in the organization. Other times, when he overestimated, (423) he would go to work and see if he could place it.

Q. Did there come a time in 1968, the summer of 1968, when a decision was made by the New York Stock Exchange that affected your business substantially? A. Are you suggesting the summer of '68?

Q. Yes. A. Yes. I believe you are referring to the give-up practices that existed for many years for the period to December 5, 1968.

Q. What is meant by a give-up? A. Yes. Large institutional investors, and primarily mutual funds, at that time were permitted to a direct of the portion of the commission, any portion arbitrarily they determined the member firm was willing to live with, to direct that portion to another firm. We enjoyed a good deal of benefits from this practice when it was permitted and we were the primary brokers for several mutual funds and enjoyed these very profitable big-ticket transactions.

Q. Was this a substantial amount of your retail business? A. It wasn't retail business. This was apart from our retail business. It was an important part of our total mix and was an important contributor to our profits (424) and we realized it.

Q. What happened in September 1968 with regard to these give-ups? A. The practice announced with some lead time, I don't recall if it was three months or longer, but it was no surprise. It was somewhat clear for perhaps the better part of a year that this was possible and at some moment it was described that all give-up practices had to end on December 5th of that year.

Q. What year was that? A. 1968.

Q. When was it decided by Hertz, Warner to give up or to consolidate their retail sales operation? A. We made a definitive decision along about the third week of January, 1969.

Q. And what was the decision at that time? A. We decided that our branch office operation was only marginally profitable and with the loss of the benefits from the give-up business that we would consolidate our operation in one office and sell our branch offices.

Q. Which was going to be the remaining office? A. The office at 2 Broadway.

Q. Was Paul Cohn aware of this decision? A. Yes, he was.

(425) Q. And when to your knowledge did he become aware of this decision? A. I would say that everyone in the firm became aware of it virtually at the same moment, and it was some late day in January, it might have been January 27 or 28, 1969.

Q. How did you go about liquidating or selling off the branch offices that you didn't want to keep? A. Well, we had a fortuitous situation that we did not plan. It was our idea to announce to our organization at one moment that this was our management decision, and we recognized the problems of losing an organization, so we indicated that it was our policy that we would not sell any branch office without the branch knowing about it and we would permit the branch manager to show the branch office to some other firm with our prior knowledge.

So that in that fashion the salesmen had some feeling of security that the firm would not sell anybody out or sell any branch out from under them. We did not plan it this way but the notice that we presented to our organization was picked up by Dow Jones and they called to confirm it and they happened to speak with me and I confirmed it was so. It was on the Dow Jones wire (426) within 10 minutes and perhaps 20 minutes later the New York Times called me and got the same story and they developed a new story about it.

We did not issue any press release for the next morning's paper. It read well because at that time, with the paper crunch, many firms were thought to be in trouble, and we were not. This was a voluntary act that we thought made sense. And the Times played it just that way. That Times story, and subsequently there was a Fortune

magazine story, all generated interest in a very ordinary way and for the most part we made sales to other firms that heard about it in this very positive way.

Q. And this started as of January of 1969? A. That's correct.

Q. Do you remember when the first office was sold approximately? A. I believe the first office we sold and the one we were most anxious to sell was the one in Beverly Hills, California. I believe that occurred as soon as March.

Q. Now, did giving up these branch offices mean that you were giving up the brokerage business? A. No, it did not.

Q. What were your plans for the future of Hertz, Warner with regard to being without the branch offices? (427) A. We developed some expertise in the area of interexchange arbitrage. We were also doing a broker-dealer business whereby we could properly reciprocate to them on regional exchanges and we were looking to develop this area of activity which we thought would be most profitable.

Q. Is there a word for this area, one word that would describe this area? A. One area would be interexchange arbitrage, the other a broker-dealer reciprocal business. I don't know if it has a better term.

Q. Did you ever use the word professional side of the business? A. Yes, we did. I don't know if that's an industry but within our organization we called it that we were going professional.

Q. As far as you know, everybody in the firm was aware of this at the time? A. Yes.

Q. Including Paul Cohn? A. No question about it.

Q. Did there come a time when you decided to sell the office at Broadway? A. Yes, it did occur.

(428) Q. And to whom was that sold? A. It was sold to Walston & Company.

Q. When was this sold? A. This was delivered to them on or about December 1, 1969.

Q. And at that time who was the partner in charge of that branch? Was there a partner in charge of that branch? A. Well, I think you are probably thinking of Mr. J. Saluc. Mr. Saluc was a member of the executive committee and did a certain amount of supervisory work relative to that branch and was close to the registered reps of that branch.

Q. In your opinion what did it or what effect did closing the branches have on the capital requirements of the firm?

Mr. Genovese: Objection, your Honor.

Mr. Weisberg: I will rephrase the question.

Q. Did the decision and the actual act of closing the branches have any effect on the capital requirements of Hertz, Warner? A. Yes.

Q. What was that effect? (429) A. Basically when you run a retail business and you are a clearing firm such as we were, you permit your clients to have margin accounts whereby they are borrowing money from you, and that type of relationship with your client has certain very important capital requirements. So with the substantial reduction of retail business there was also the attendant reduction and need for capital.

Q. With regard to subordinated lenders and the limited partners, was the firm paying any money for the capital contributions of these people? A. Absolutely.

Q. And how much were they paying? A. We paid 6 per cent for cash and 4 per cent for the haircutted value of securities. And my recollection was that the haircutted value was 70 per cent of the total. I think Mr. Meyer suggested two-thirds yesterday. That might be a round figure, but my recollection was 70 per cent.

Q. Did there come a time in 1969 or 1970 when capital was returned to limited partners or subordinated lenders? A. Yes.

Q. When was that? (430) A. At year end of 1969 or effective January 1, 1970 we did return an important amount of limited and subordinated capital.

Q. Do you have any idea how much capital it was? A. No, I don't.

Q. In round numbers, approximately how much was it?

Mr. Genovese: Objection, your Honor. He said he didn't have any idea how much it was.

The Court: Sustained.

Q. To refresh your recollection, was it thousands, hundreds?

Mr. Genovese: I object, your Honor.

Mr. Weisberg: Can I help him restore his memory?

The Court: I don't see why you should help him. He either knows or doesn't know. If you now give him a number and he says yes, I can't give it much weight anyway.

Q. Let me put it another way. Was it thousands, hundreds of thousands or millions of dollars?

Mr. Genovese: I object again.
The Court: I will allow that.

Q. Was it thousands, hundreds of thousands or (431) millions of dollars? A. We were a firm that had capital—

Mr. Genovese: I object. It is not responsive.
The Court: Could you answer the question as it has been put?
The Witness: I would have to speculate on the proportions and I could not give you something from knowledge.

Q. Now, after Walston & Company purchased the office at 2 Broadway was there any discussion at that time about Hertz, Warner going out of business? A. Absolutely not.

Q. As of March of 1970 where was the office of Hertz, Warner located, the main office? A. Let me fill you on this. When we made the deal with Walston & Company effective December 1, 1969, part of the arrangement was our having use of a certain amount of the space at 2 Broadway for a period of six months rent free. So that we had shelter for our production areas for that six month period of time.

Mr. Genovese: Your Honor, I move to strike the answer on the ground it is not in response to any question.
(432) The Court: I will allow it.

Q. Did there come a time subsequent to the sale of the office to Walston & Company when the firm decided it needed other space? A. Yes. We were aware that on May

1st we had to find some outside space and we searched the market and found space in the month of March and we signed a three year contract, a three-year lease on March 17, 1970. I remember the date because it was St. Patrick's Day.

Q. Did you ever meet Mr. and Mrs. Fine? A. I believe I did.

Q. And do you remember when it was that you met them? A. Yes, it was the date of Paul Cohn's wedding to Leslie.

Q. Prior to that time had you ever met Mr. and Mrs. Fine? A. No, I did not.

Q. Did you ever have any communications with them? A. None.

Q. Did Paul Cohn ever, to the best of your recollection, request any financial information of you concerning Hertz, Warner? (433) A. No, he did not.

Q. Who was the person, the partner in the firm who would have current financial statements of the partnership? A. I believe when we prepared monthly statements they were available—they were physically prepared and delivered to the four members of the executive committee, and I always had a monthly statement.

Q. Did there come a time when Paul Cohn mentioned his capital contribution to you? A. I don't recall when the subject of Paul Cohn's capital contribution came up.

Q. You have no recollection of that conversation? A. That is correct.

Q. Did you ever tell Paul Cohn that his capital contribution of $100,000 was a prerequisite to becoming a partner of the firm?

• • •

(434) A. The answer is no.

Mr. Weisberg: No further questions.

Cross-examination by Mr. Genovese:

Q. Mr. Warner, when was your first conversation with Paul Cohn regarding the possibility of him becoming a partner of Herz, Warner & Company? A. I would suggest that this probably occurred in the early spring of 1969.

Q. Do you have any recollection of that conversation, sir? A. There is no one moment that I can suggest because I didn't have any prearanged meetings with Paul. We saw one another constantly and I can't pinpoint when this might have occurred.

Q. Do you have any recollection of the conversation (435) at which the subject first came up? A. It occurred in the manner as I just testified. Paul Cohn came to me and told me he would like to become a partner again.

Q. And what did you say to him, sir? A. I told him, as I said before, that I thought it was a proper thought. He was conducting himself as a manner of a partner, was running a very important department in a very well organized way, and that I would support that position.

Q. Was anything else said, sir? A. I don't recall anything else material to this partnership.

Q. When was the next conversation with Paul Cohn regarding the subject of his becoming a partner. A. In between I reported to the executive committee of this conversation with Paul and I made the recommendation that we make the move. I was enthusiastic about it, and the executive committee endorsed it and I suggested to the executive committee that Paul Cohn be invited in as a 3 per cent partner and that is the only subject that I discussed with Paul Cohn when I returned to him, that the executive committee had endorsed the idea that I was authorized to offer him a 3 per cent (436) partnership interest.

Q. When was this conversation, sir? A. Shortly after the first one.

Q. You had the first conversation, then a meeting of the executive committee, is that correct? A. Yes.

Q. Then a further conversation with Mr. Cohn in which you reported back that the executive committee had approved of his becoming a partner and that his participation would be 3 per cent, is that correct, sir? A. That's correct.

Q. Was anything else said in that conversation? A. I don't recall anything.

Q. When was the next conversation with Mr. Cohn regarding his becoming a partner? A. I can't put together second conversations because of the continuous nature of the relationship. I can suggest this: that it would have been a very short period of time between the first time Paul spoke to me and when I came back to him for the reason our executive committee met virtually without fail every Monday evening. So that the most that could have elapsed would have been a week's time.

Q. Now, we have had two conversations with Mr. Cohn, (437) is that correct? A. That's correct.

Q. Was there a third? A. There probably were countless conversations in many ways but I cannot recall any other conversation that specifically dealt with an important area of partnership.

Q. So you have related to the court now the full substance of the conversations that you have had with Mr. Cohn regarding the possibility of him becoming a partner, is that correct? A. To the best of my recollection on this day.

Q. You have no recollection of discussing a capital contribution with him, do you? A. That's correct.

Q. You have no recollection of discussing any profits of Hertz, Warner with him, do you?

Mr. Weisberg: Objection, your Honor. He just testified that he did. The witness just testified that he said he offered Mr. Paul Cohn—

The Court: Saying what somebody just said is not in itself a ground of an objection, I suppose.

Mr. Weisberg: I withdraw the objection.

The Court: What is the question?

(438) (Question read.)

The Court: You may answer.

A. I have no recollection of discussing profits of Hertz, Warner with Paul Cohn.

Q. Do you have any recollection of discussing the share of losses that Mr. Cohn would assume? A. I have no recollection of that at all.

Q. Do you have any recollection of telling him that the firm had suffered financial losses? A. Absolutely not. I have no recollection of that.

Q. Do you have a recollection of telling him that you had monthly statements in your possession? A. I didn't tell him that.

Q. You didn't tell him? A. I did not.

Q. Do you have any recollection of discussing salary with Mr. Cohn? A. I do not.

Q. Do you have any recollection of Mr. Cohn saying to you that he couldn't live on a $15,000-a-year salary? A. No, I do not have any recollection of that suggestion by Mr. Cohn.

Q. Do you know what Mr. Cohn's salary was as of the (439) spring of 1969? A. I only know it as a result of reading the deposition—

Q. No, independently of what someone may have said, do you have any knowledge yourself? A. No.

Q. Do you have the knowledge of the range of his salary? A. No, it would just be a speculation.

Q. Do you have any knowledge of Mr. Cohn discussing Peerless Mills with you in the spring of 1969? A. No, I don't think I ever heard of the name of Peerless Mills.

Q. Did the subject of where he was going to get his capital contribution come up? A. No, not with me.

Q. Not with you. Do you remember testifying on depositions, Mr. Warner? A. Yes, I do.

Q. I asked you questions on August 16, 1973, is that correct, sir? A. That's correct.

Q. Did I ask you these questions and did you give these answers:

(440) "Q. Did you have any discussion"—page 17, line 12—"Did you have any discussion with him as to the source of that capital contribution? "A. Yes.

"Q. What did he say to you and what did you say to him? "A. He volunteered his father-in-law was well-to-do and he married his only daughter and he would request capital from him"?

Did you give that answer, sir? A. It's very possible I did. I'm certain I did, if you are reading from the deposition.

Q. Does that refresh your recollection now, sir? A. Not at all. Let me say this: As a result of being the last witness and having heard testimony in the course of this trial it is hard for me to say when I heard when Mr. Cohn was going to make his capital contribution. I know that in my conversations with Mr. Cohn I never asked him for a capital contribution, nor do I recall his voluntarily advising me that he would make such a capital contribution. I believe I heard of his capital contribution from Mr. Hertz and I believe I heard that Mr. Cohn was going to get capital from his in-laws.

(441) Q. As of this time you don't have any recollection of the conversation you testified to in your deposition? A. I have no recollection of having any conversation with Paul Cohn relative to his capital.

Q. Now, Mr. Warner, after the last conversation you presently recall with Mr. Cohn regarding the subject of his becoming a partner of the firm of Hertz, Warner & Company, did there occur any additional conversations in which you disclosed financial information to Mr. Cohn prior to December 1, 1969? A. I don't recall any such conversations.

Q. As of the spring of 1969, sir, did you know what Hertz, Warner's profit was for the first six months of the fiscal year 1969? A. Yes, I did.

Q. Do you know it now, sir? A. Yes, I do.

Q. What was it, sir? A. Approximately $1 million.

Q. Do you recall telling Mr. Cohn that? A. No, I do not.

Q. Do you know now what the year-end financial results were for the period ending June 30, 1969? A. Yes, I do.

(442) Q. What was that, sir? A. Approximately $100,000.

Q. Do you recall telling Mr. Cohn that? A. No, I do not.

Q. Do you recall when the partnership agreement, which has been marked Plaintiff's Exhibit 1 in evidence in this case, was circulated to the partners for signature, sir? A. I must say I'm influenced by the testimony I have heard so far and I wouldn't have had a fix on it if it weren't for the trial.

Q. Well, do you have a fix on it? A. Well, it's obvious from all that's preceded—

Q. I don't want you to tell me what preceded because that doesn't help me. I'd like to have your recollection as to when you— A. I would have had to guess when the

partnership agreement came. I can't put myself in that position without having—now that I have heard all the testimony.

Q. Well, you have no idea independently of the testimony as to when it was circulated? A. That's correct.

Q. Do you recall when you signed it, sir? A. I'm sure I signed it the minute it was presented (443) to me.

Q. Do you recall the circumstances under which you signed it? A. No.

Q. Can you recall in what time period, December, 1969, January, 1970, you signed the agreement? A. Whenever the agreement was put in front of me I would have signed it.

Q. That doesn't help me. You have no idea as to time? A. I cannot pinpoint it, that's correct.

Q. Do you recall Mr. Saluc leaving the firm? A. Yes, I do.

Q. When did he leave? A. He left at the time we delivered the office to Walston & Company, so that would be approximately December 1, 1969.

Q. Do you recall whether you had signed the partnership agreement as of that time? A. I don't know if I did.

Q. Do you recall Mr. David Warner being admitted as a partner in the firm? A. Yes, I do.

Q. When was that, sir? (444) A. That would be approximately December 2 or 3, 1969.

Q. Do you recall whether you had signed the agreement as of that time? A. I don't recall.

• • •

Q. Did there come a time, Mr. Warner, when you learned that certain persons who were designated as persons in Plaintiff's Exhibit 1 did not in fact sign the agreement? A. I don't know who these people are that you are referring to.

Q. I am asking you did there come a time when you learned that fact, that certain persons— A. When you say partners, Exhibit 1 is something I can't pinpoint.

Q. That's my fault. It's the partnership agreement of July 1, 1969. I will repeat the whole question.

Did there come a time, Mr. Warner, when you (445) learned that certain persons who were listed as partners in the partnership agreement of July 1, 1969, Plaintiff's Exhibit 1 in evidence, did not sign that agreement? A. The signing of that agreement was something that was not at all important to me at that time, and I never thought about it during that period.

Q. Did there come a time when you learned that fact? A. I would say it could perhaps have occurred years later.

Q. Again I refer to your deposition, Mr. Warner, particularly page 26, line 23, and ask you whether you recall me asking you this question and you giving the answer:

> "Q. Did it ever come to your attention that certain of the persons who were to be signatories to the July 1, 1969 partnership agreement had not signed it? A. Yes.
>
> "Q. When was that? A. I would estimate that was in December, 1969, January, 1970."

Did you give that answer, sir? A. I'm sure that I did.

Q. Do you have any recollection of the fact now, (446) sir? A. I can't be any more helpful relative to the background that motivated that answer at that time.

Q. Well, was your recollection better at that time of the events? A. I might say this: that prior to that deposition I read several other depositions and I could have then been influenced by what I read in those depositions because it appeared that the signing of that during that

period of time was significant and I responded then with that background and I respond today with what I think of today.

Q. Are you telling me, Mr. Warner, that when you answer a question you can't separate your own knowledge from what you have heard from other people? A. Let me say this—

Q. Would you answer that?

> The Court: I don't really care about the answer to that, if it's all the same.

Q. Did there come a time, Mr. Warner, when you learned that Messrs. Meyer and Blau would not sign the July 1, 1969 partnership agreement? A. Mr. Genovese, that whole area just was not important to me and I can't think clearly—

> (447) The Court: Mr. Warner, please, just answer the questions. If the answer is no, please just say so.
>
> The Witness: Repeat the question and I will try to answer it yes or no.
>
> (Question read.)

A. Yes.

Q. When was that, sir? A. I can't pinpoint the time.

Q. Did you ever disclose that to Mr. Cohn? A. No.

* * *

Q. Did there come a time when the younger partners held a meeting with Mr. Hertz in the fall of 1969 or early 1970 to your knowledge? A. I don't recall.

Q. Were you ever told of such a meeting by Mr. Hertz? A. I don't recall such a meeting.

Q. Were you ever told of such a meeting? A. No.

Q. Do you recall whether the younger partners asked (448) for current profit and loss statements? A. No, I don't recall that.

Q. Do you recall any partnership meetings in the firm of Hertz, Warner? A. Yes.

Q. When, sir. A. I recall a meeting in January of 1970 when several of the younger partners came forward and indicated they would like additional participation.

Q. That was a partnership meeting? A. Well, we never had as such formal partnership meetings. The nature of our business, and particularly during the last year when there was a lesser number of us, was one in which we were together on a constant basis. We had an open door policy and everybody spoke his mind and I think that was one of our strengths.

Q. Do you recall a partnership meeting at which Mr. Cohn made a request for partners to come up to capital? A. No, I do not.

Q. Do you recall a meeting at which he discussed his position with Peerless and the loan of the 2000 shares of AT&T stock? A. No, I do not.

Q. Do you recall a meeting at which Mr. Hertz (449) disclosed that the firm had suffered certain losses? A. No, I do not.

Q. Now, were you consulted with respect to Mr. Saluc's withdrawal from the firm? A. I believe it was something that I recognized was going to occur and I probably decided that this was a correct move at that time. I was one of those who would have judged this was a good move at that time.

Q. Do you have any recollection of discussing it with anyone? A. Not specifically.

Q. Do you have any recollection of discussing whether or not his $100,000 capital contribution should be returned to him? A. No. This was a standard procedure, that when our general partners retired, and a number of them did when we sold our branch offices, we executed a standard release and it was just understood that the same thing would occur when Mr. Saluc retired.

Q. What was the firm's financial condition when Mr. Saluc retired? A. I thought it was quite good.

Q. Had they sustained losses, had the firm sustained losses, in February, March, April, May, June, July, August (450) and September, 1969? A. We had operating losses during that period of time, that's correct.

Q. Now, as of the fall of 1969 do you know whether all of the general partners designated in Plaintiff's Exhibit 1, the partnership agreement, had contributed their stated capital into the firm? A. As of what date?

Q. As of the fall of 1969. Let's pick a date, October 1, 1969. A. I don't know as a matter of fact whether they did or did not.

Q. Do you know whether they contributed the capital as of November 1, 1969? A. No, I don't.

Q. December 1st? A. No.

Q. Did you ever make an effort to find that out, sir? A. It didn't concern me and I didn't make an effort to do it.

Q. It didn't concern you whether the partners contributed their capital or not? A. That's correct.

(451) Q. Do you know whether the partnership agreement was ever filed with the New York Stock Exchange? A. No, I do not.

Q. Do you know whether the exchange ever raised questions concerning the status of certain capital contributed pursuant to that agreement? A. I had no knowledge of that at all.

Q. Did you ever discuss it with anyone? A. No.

Q. Did you have any knowledge as to whether or not certain limited partners and subordinated lenders were leaving the firm as of December 31, 1969? A. I was aware that there were limited partners and subordinated lenders that were leaving the firm as of that time.

Q. Have you ever seen Plaintiff's Exhibit 3 in evidence? A. I have never seen this before.

Q. Did you ever discuss with anyone whether the exchange was of the opinion that by reason of the fact that certain limited partners and subordinated lenders were leaving the firm, the firm suffered a substantial adverse change in its capital position? A. Repeat the question, please.

(452) (Question read.)

A. No.

Q. I show you what has been marked Third-Party Defendant's Exhibit B in evidence, a securities loan agreement between Peerless Mills and Paul Cohn, and ask you whether you have ever seen that document before. A. No, I have not.

Q. Mr. Warner, I show you what has been marked as Plaintiff's Exhibit 21 in evidence, a letter dated December 29, 1970, from Mr. Held to Mr. Arthur Winard. Have you ever seen a copy of that letter before, sir? A. I think I saw this yesterday for the first time when you were looking for it.

Q. Who is Mr. Arthur Winard, if you know? A. I do know. He is an attorney.

Q. Has he represented you? A. Yes, he has.

Q. Was he representing you as of December 29, 1970? A. Yes, he was.

Q. And did you ever see a copy of the schedule which is attached to Plaintiff's Exhibit 21 in evidence before yesterday? A. No, I don't ever recall seeing that before.

Q. Looking at that schedule and particularly next (453) to your name, is the figure accurate there as to the deficit in your capital account? A. There is no date on this and I can't indicate whether that is correct or not.

Q. Did there come a time, Mr. Warner, when you learned with definity that Meyer and Blau would not sign the 1969 agreement? A. I don't know when I was aware that that occurred.

Q. Did Mr. Hertz show you a copy of a leter he received from Mr. Meyer dated July 6, 1970, Plaintiff's Exhibit 25 in evidence? A. I have never seen this letter before.

Q. You mean before this case started? A. Before you just showed it to me this minute.

Q. You saw it at your deposition, did you not? A. Then I don't recall seeing it before. If you produced it then, I don't recall it now.

Q. Now, at any time, Mr. Warner, did you seek the approval of Messrs. Meyer and Blau to the admission of Mr. Cohn, Mr. Sadlier or Mr. Held as partners of the firm? A. I don't recall ever discussing with Messrs. Meyer & Blau the admission of the three gentlemen you just mentioned (454).

Q. Do you know whether that was done? A. I don't know if it was.

Q. Did you ever have a discussion with Mr. Cohn as to what he could be expected to earn as a partner of Hertz, Warner? A. No.

Q. You did not? A. That's correct.

Q. Did you learn, Mr. Warner, that Mr. Cohn had made his capital contribution to the firm of Hertz, Warner? A. Did I learn what?

Q. That he in fact made his capital contribution to the firm? A. It's hard for me to say now that I was aware that he had made his capital contribution at any time during my association with Hertz, Warner & Company. I was not preoccupied with whether Mr. Cohn made his capital contribution or not. I did not think of it at that period of time. I did not consider it a problem.

Q. When did you leave the firm of Hertz, Warner? A. I left the firm at the end of April; perhaps April 27, 1970.

Q. And who was left at the firm at that time, if (455) you know? A. Mr. Hertz, Mr. Sadlier, Mr. Held, Mr. Cohn.

Q. Where did you go? A. I went to Axelrod & Company.

Q. Did you receive a release from the firm of Hertz, Warner at the time of your departure? A. No, I did not.

Q. Do you have a realese as of this day? A. No, I do not.

Q. Have you entered into any agreement with the firm? A. No, I have not.

Q. Have you agreed to pay back certain deficiencies in your capital account? A. I signed a note relative to a certain amount.

Q. How much was that? A. I believe there were several notes.

Q. For how much?

Mr. Lipkin: Your Honor, I think we are getting back into the area that you ruled irrelevant with regard to Mr. Warner's capital account and withdrawals and substitutions, and so on.

A. Why is it relevant, Mr. Genovese?

Mr. Genovese: I think it is relevant to show (456) what his deficiency was, which I cannot establish from the letter because everyone denies knowledge of the letter, your Honor, and his withdrawal only three months after Mr. Cohn became a partner, and I think it is evidence of the fraud to show what the deficiency was at that time.

The Court: All right. I will allow it.

Q. What were the amounts of the notes you signed, the total amounts? A. I signed notes in the total amount of $350,000.

• • •

Redirect examination by Mr. Weisberg:

Q. Mr. Warner, how much of that $350,000 note have you repaid so far? A. $250,000.

Q. How much did you have in the firm prior to paying back that $250,000? A. $201,000

Q. So then you have had a lotal of $450,000 in the (457) firm subsequent to, let's say, June 1, 1970? A. That's correct.

Q. What's happened to that money? A. It's been entirely lost.

Mr. Weisberg: No further questions.

Recross-examination by Mr. Genovese:

Q. How did it come about you owed $350,000 to the firm?

Mr. Weisberg: Objection, your Honor.

The Court: I don't really think that's important. I take it that that was the extent of his undercapitalization.

Is that right?

The Witness: That's right.

Mr. Genovese: That's all the questions.

The Court: Mr. Warner, let me ask you, when you left the firm, without describing it technically because I don't know the technical description, it was dead, yes.

The Witness: Not exactly, your Honor. When we terminated at the end of April, 1970 it was our original plan to deliver the viable areas of our firm, namely, the interexchange arbitrage that I was then doing (458) and the broker-dealer reciprocal business, which we were then doing, to another member firm. We had the continuing responsibility of delivering out our public accounts. It was because of that responsibility and all the effort that went into it that we realized we couldn't properly service the professional business. We thought it was a good decision in late April not to put any more input of our professional activities into Hertz, Warner's clearing plant. It was our original plan to move the viable division into another member firm that had the capacity to handle it.

Part of the arrangement was that Hertz, Warner & Company would make a capital contribution to

the other firm. Hertz, Warner had a six-week period of time to do this. At the end of this six-week period Hertz, Warner did not make a capital contribution and that moment was really the last time Hertz, Warner & Company had income.

The Court: That would be the end of May?

The Witness: Mid-June. We ended late April or May 1st and the six weeks had been up around mid-June.

The Court: Would it or would it not be correct to say that at the time you left the enterprise (459) was in a disastrous condition?

The Witness: I think it's a fair statement.

The Court: Would that be a fair statement?

The Witness: That would be a fair statement.

The Court: Would it be fair to say that you didn't learn that on the day you left but that you had been aware that this situation was developing?

The Witness: I'd like to correct the term "disastrous." I believe at that point we recognized it was a difficult situation but we had reason to believe that we had a viable, profitable business and that we could continue to earn a living from that business and throw off profits that would help complete the job of delivering out the public accounts at Hertz, Warner & Company. I think that would be a more proper description of what our thoughts were at that time.

The Court: Does that time refer to the day you left and went to another firm, you were still of that view?

The Witness: Yes, I was.

Colloquy

The Court: But would it be correct to say that for some time before your departure, physical (460) deparature—before I go to that, were you still a member of the firm after you went to work elsewhere?

The Witness: No.

The Court: You retired from the firm?

The Witness: I had to retire. The exchange requires it.

The Court: Would it be correct to say that for some time prior to your departure you were aware that the business of the enterprise was in perilous condition, difficult condition?

The Witness: Yes, that would be fair.

The Court: And for how long had you had such an awareness?

The Witness: For a very short period of time. During the entire period from January, 1969 virtually until the very end I was always very hopeful that we had made a correct judgment and that the market would do better and that volume would improve and that we would succeed.

The Court: Did you still have that feeling in February, 1970, let's say?

The Witness: Yes.

The Court: As you look back on these events, which I take it are not happy events in your business life, can you mark any point or occurrence or set of (461) occurrences when you were made vividly aware that the tide had turned, or can you mark any occurrences?

I'm allowed to ask bad questions because I don't work at it any more. Can you mark any occurrences

in retrospect that now account for turning the tide? I know those are two questions but why don't you speak to them.

The Witness: Yes. On March 17, 1970, at that moment of time, that is a significant time because at that moment we signed a three-year lease. At that moment we had full expectations of moving into the space, which we never did, and fully expected that we could stem the tide of this period.

It became very apparent in a moment—it might have been the second week of April, 1970 that we were not properly prepared to do this professional business. We learned then that our back office, which was fully dedicated to delivering out the public accounts, could not properly receive and deliver securities to the regional exchanges where I was conducting this interexchange arbitrage business. We became aware suddenly then that this business caused a substantial amount of interest expense and we didn't have the box, that means we didn't have the available securities ourselves to receive and (462) deliver all the time. We found it necessary to make stock loans from other firms and laying out capital. We were very inefficient to handle this business. And this business by itself appeared to be the most profitable, and it is, and I'm still doing it today, earning a living as an employee of another firm doing this type of work today, and it was very clear to us then that we just couldn't properly handle it. And I would suggest that this occurred quite suddenly in about the second or third week of April.

At that time Wall Street was just at the brink of collapse, and to just give you a swing of time, the market made its all-time high of 985 by the Dow Jones averages in December, 1968, virtually the moment when the give-up practices stopped. So that was it as far as Wall Street was concerned. We know that now, five years later.

During this whole period of time the market, almost without any interruption, was in a declining phase and actually made a bottom of 630 in May, 1970. I was always hopeful that there would be a better atmosphere. So it all culminated at that moment where we just stood it for such a long time, we had a good, profitable entity and it made sense to us to protect it. But with that atmosphere in the Street it wasn't possible for us to take a (463) lot of time to show what we had to other firms. It was very convenient, and I didn't do this alphabetically, I just did it because there was someone I knew at Axelrod & Company. Irwin Axelrod, the founding partner, was our first floor broker. I made one call to Axelrod, who had a clearing firm and indicated we had a viable division that we would like to move. We made the deal with them in two or three days' time. The moment the decision occurred, the action occurred in a minute. This was not planned and conceived in advance, that that's the way it would end. We made the decision and it probably, as events would show, was a good decision, because we terminated our firm in a most dignified manner, with our own capital, without any stock exchange contribution. We delivered out some 30,000 public accounts.

Henry Warner—By Mr. Genovese—Recross

I think all our limited partners, general partners, subordinated lenders, acted in a most honorable way when we terminated our relationship with them. That's how Hertz, Warner expired.

The Court: If I have generated more confusion than I am supposed to and counsel have other questions, you may go ahead.

Anything else, Mr. Genovese?

Mr. Genovese: One question, if I may, your (464) Honor.

Recross-examination by Mr. Genovese:

Q. Mr. Warner, I show you Plaintiff's Exhibit 1 in evidence and ask if that contains an accurate list of the appended general partners as of July 1, 1969. A. I would say it does.

Q. Now, you testified that as of the time you left the firm, namely, May 1, 1970, the only people who remained were Mr. Hertz, is that correct? A. I think I said Mr. Hertz, Mr. Sadlier, Mr. Cohn and Mr. Held.

Q. Now, when did Mr. Litt leave? A. He left simultaneously with myself.

Q. How about Mr. Sheldon? A. I think he left around January 1st.

Q. How about Mr. Jenner? A. I would say he left simultaneously with myself.

Q. How about Mr. Kramer? A. I don't think Mr. Kramer ever became a partner. We intended that he become one but I don't think he ever did become a partner. He didn't sign the agreement.

A. I don't believe he signed—I don't think he signed the agreement and I believe we mutually agreed (465) that he would not become a partner.

Q. How about Mr. Gilman? A. Mr. Gilman retired the same time that Mr. Saluc retired.

Q. How about Mr. Sadlier?

* * *

By Mr. Genovese:

Q. Mr. Sadlier? A. I'm not certain when he retired. Probably the same time as I did.

Q. Mr. Carney? A. The same time as I did.

Q. Mr. Matthews? A. Exactly the same time as I did.

Q. Now, Mr. Warner, was there any month after February, 1969, when the firm of Hertz, Warner showed a profit? A. I specifically can't recall any. Perhaps we did, but I don't recall any.

Q. Well, you did receive monthly P & L's, did you (466) not? A. That is correct.

Q. Do you have any recollection of any one month, any one month in that period, of showing a profit? A. I can't recall any right now.

Q. Isn't it a fact that you suffered a loss in every month after February, 1969? A. I don't know that we did.

Q. Do you recall the extent of the loss for the period July 1, 1969? A. No, I do not.

Q. Do you have any idea in round numbers? A. No, I'm sorry, I do not.

* * *

Plaintiff's Exhibit 1

AMENDED ARTICLES OF LIMITED PARTNERSHIP

OF

HERTZ, WARNER & Co.

Agreement made as of the 1st day of July, 1969 by and between the partners of Hertz, Warner & Co.

WITNESSETH:

Agreement made as of the close of business June 30, 1969, by and between Irving E. Hertz, residing at 386 Hartford Road, South Orange, New Jersey (hereinafter referred to as Hertz), Henry Warner, residing at 39 Fairfield Terrace, Short Hills, New Jersey (hereinafter referred to as Warner), Jay Saluc, residing at 6 Midfarm Road, Rockville Centre, New York (hereinafter referred to as Saluc), Norman F. Carney, residing at 370 East 76th Street, New York, New York (hereinafter referred to as Carney), Paul Cohn, residing at 420 East 64th Street, New York, New York (hereinafter referred to as Cohn), Vincent Genna, residing at 87-12 75th Street, Woodhaven, New York (hereinafter referred to as Genna), Martin L. Gillman, residing at 39 Tremont Terrace, Livingston, New Jersey (hereinafter referred to as Gillman), Joel Held, residing at 1865 East 18th Street, Brooklyn, New York (hereinafter referred to as Held), Benjamin Kramer, residing at 10 Huron Avenue, Jersey City, New Jersey (hereinafter referred to as Kramer), Milton Litt, residing at 200 Webster Avenue, Roselle Park, New Jersey (hereinafter referred to as Litt), Charles Matthews, residing at 85-04 63rd Drive, Rego Park, New York (hereinafter referred to as Matthews), James Sadlier, residing at 250 Clarkson Avenue, Brooklyn, New York (hereinafter referred to as

Exhibit 1

J. Sadlier), Robert Sadlier, residing at 620 2nd Street, Brooklyn, New York, 11215 (hereinafter referred to as R. Sadlier) and Kenneth Sheldon, residing at 461 Jauncey Avenue, Lyndhurst, New Jersey (hereinafter referred to as Sheldon), as General Partners; Joseph Blau, residing at 1020 Park Avenue, New York, New York (hereinafter referred to as J. Blau), Arthur Meyer, residing at Sunnyridge Road, Harrison, New York (hereinafter referred to as A. Meyer), Benjamin I. Schiff, residing at 70 Bonnie Meadow Road, Scarsdale, New York (hereinafter referred to as B. Schiff), Louis S. Adler, residing at 6 Muirfield Road, Rockville Centre, New York (hereinafter referred to as Adler), Marjorie Alfus, residing at 1150 Park Avenue, New York, New York (hereinafter referred to as Alfus), Sydelle Meyer I/T/F Mitchell Alfus, residing at Sunnyridge Road, Harrison, New York (hereinafter referred to as The Mitchell Alfus Trust), Sydelle Meyer I/T/F Wendy Alfus, residing at Sunnyridge Road, Harrison, New York (hereinafter referred to as The Wendy Alfus Trust), Barney Asarnow, residing at 26 Edgemont Road, West Orange, New Jersey (hereinafter referred to as Asarnow), Florence Baron, residing at 108-48 70th Road, Forest Hills, New York (hereinafter referred to as Baron), Anne Berch, residing at 3865 Cannon Place, Bronx, New York (hereinafter referred to as Berch), Elena Berrie and Max Walker I/T/F Elena Berrie, residing at 52 Woodhail Street, Lido Beach, Long Island, New York (hereinafter referred to as The Berrie Trust), Dr. Lawrence M. Blau, residing at 18 Channing Place, Eastchester, New York (hereinafter referred to as L. Blau), Tamar Bruckman, residing at 20 Metropolitan Oval, New York, New York (hereinafter referred to as Bruckman), Molly Burack, residing at 51 Athens Road, Short Hills, New Jer-

sey (hereinafter referred to as Burack), Bertha Cannold, residing at 900 Broadway, c/o Capital Coat, New York, New York (hereinafter referred to as Cannold), Leo G. Cunniff, residing at 35 Hillcrest Road, Cedar Grove, New Jersey (hereinafter referred to as Cunniff), Hilda Daitch, residing at Justin Road, Harrison, New York (hereinafter referred to as Daitch), Robert L. Feinberg, residing at 145 Darmouth St. W. Newton, Massachusetts (hereinafter referred to as Feinberg), Walter Feldesman, residing at 6 Sammis Lane, White Plains, New York (hereinafter referred to as Feldesman), Diana Fisher, residing at 758 Fifth Avenue, New York, New York (hereinafter referred to as D. Fisher), Philip Fisher, residing at 758 Fifth Avenue, New York, New York (hereinafter referred to as P. Fisher), Lewis B. Frumkes, residing at 55 East End Avenue, New York, New York (hereinafter referred to as Frumkes), Alice Giffuni, residing at 20 Cranford Street, Forest Hills, New York (hereinafter referred to as Giffuni), Melvin Gold, residing at 29 Lakeview Drive, West Orange, New Jersey (hereinafter referred to as Gold), Sol Goldman, residing at P. O. Box 607, Monticello, New York (hereinafter referred to as Goldman), Irving Tobin I/T/F Nina, Charles, and Ronald Gold, residing at 251 No. Broad Street, Elizabeth, New Jersey (hereinafter referred to as The Gold Trust), Norman Gordon, residing at 300 Central Park West, New York, New York (hereinafter referred to as Gordon), Reta Harrison, residing at 101 Old Mamaroneck Road, White Plains, New York (hereinafter referred to as Harrison), Florence Heller, residing at 797 Rutgers Road, Franklin Square, New York (hereinafter referred to as Heller), Hertz, Warner & Co. Profit Sharing Trust and Hertz, Warner & Co. Foundation, Henry Hochman, residing at 73 Carwall Avenue, Mt. Vernon, New York

(hereinafter referred to as H. Hochman), Ida Hochman, residing at 73 Carwell Avenue, Mt. Vernon, New York (hereinafter referred to as I. Hochman), Henry Kalman, residing at 150 Central Park South, New York, New York (hereinafter referred to as Kalman), Elizabeth Klein, residing at 357 East 201st Street, New York, New York (hereinafter referred to as Klein), Beatrice Kolberg, residing at 531 E. Lincoln Avenue, Mt. Vernon, New York (hereinafter referred to as B. Kolberg), Rita A. Kolberg, residing at Tamarack Trail, Harrison, New York (hereinafter referred to as R. Kolberg), Max Lederman, residing at 87 Beacon Hill Drive, Dobbs Ferry, New York (hereinafter referred to as Lederman), Murray Lerman, residing at 1770 N. E. 191st Street, North Miami Beach, Florida (hereinafter referred to as Lerman), Selda Levine, residing at 300 Deal Lake Drive, Asbury Park, New Jersey (hereinafter referred to as Levine), Sydelle Meyer, residing at Sunnyridge Road, Harrison, New York (hereinafter referred to as S. Meyer), Ruth Miller, residing at 4 Blackberry Lane, Westport, Connecticut (hereinafter referred to as Miller), Frances Modell, residing at 5 Island Avenue, Belle Isle, Miami Beach, Florida (hereinafter referred to as Modell), Francine Moss, residing at 4 Colonial Road, White Plains, New York (hereinafter referred to as F. Moss), Henry Moss, residing at 4 Colonial Road, White Plains, New York (hereinafter referred to as H. Moss), Edward Nager, residing at 11 Fifth Avenue, New York, New York (hereinafter referred to as Nager), Bebe Prince, residing at Winfield Avenue, Harrison, New York (hereinafter referred to as B. Prince), Bebe Morris Prince, residing at Winfield Avenue, Harrison, New York (hereinafter referred to as B. M. Prince), Stanley Rader, residing at 10 Troy Drive, Short Hills, New Jersey (hereinafter referred

to as Rader), Irving Rosen, residing at 192 E. 151st Street, Bronx, New York (hereinafter referred to as Rosen), Helen Rothauser, residing at 44 Ball Terrace, Maplewood, New Jersey (hereinafter referred to as Rothauser), A. Allen Rothman, residing at 660 Evergreen Drive, West Hempstead, New York (hereinafter referred to as Rothman), Leonard Scheinman, residing at 4671 Palisade Avenue, Bronx, New York (hereinafter referred to as L. Scheinman), Richard Paul Scheinman, residing at 4671 Palisade Avenue, Bronx, New York (hereinafter referred to as R. Scheinman), Victor David Scheinman, residing at 4671 Palisade Avenue, Bronx, New York (hereinafter referred to as V. Scheinman), Annette Schiff, residing at 35 Wedgewood Lane, Lawrence, New York (hereinafter referred to as A. Schiff), Charles Schnall, residing at 99 Verdun Avenue, New Rochelle, New York (hereinafter referred to as C. Schnall), Matty Schnall, residing at 160 Fifth Avenue, New York, New York (hereinafter referred to as M. Schnall), Dr. Richard Schneider, residing at 139 E. 35th Street, New York, New York (hereinafter referred to as Schneider), Samuel Shabus, residing at 310 Riverside Drive, New York, New York (hereinafter referred to as Shabus), Max Shuster, residing at 1610 Avenue P, Brooklyn, New York hereinafter referred to as M. Shuster), Robert Shuster, residing at 1610 Avenue P, Brooklyn, New York (hereinafter referred to as R. Shuster), Milton Silverman, residing at 450 Beach 141st Street, Belle Harbor, New York (hereinafter referred to as Silverman), Lucile A. Skalet, residing at 25 Colonial Road, White Plains, New York (hereinafter referred to as L. Skalet), Steven Skalet, residing at 25 Colonial Road, White Plains, New York (hereinafter referred to as S. Skalet), Frances Spector, residing at 200 Linwood Avenue, Fort Lee, New Jersey

(hereinafter referred to as F. Spector), Barbara Strutin, residing at 37 Maplemoor Lane, White Plains, New York (hereinafter referred to as Strutin), Ruth Suchman, residing at 172 Wilmot Road, New Rochelle, New York (hereinafter referred to as Suchman), Lillian Tabor, residing at 160 West End Avenue, New York, New York (hereinafter referred to as Tabor), Sidney Tyler, residing at 249 Hoym Street, Fort Lee, New Jersey (hereinafter referred to as Tyler), and Stanley Yeskel, P. O. Box 638, 181 Chestnut Street, Newark, New Jersey (hereinafter referred to as Yeskel), as limited partners.

WHEREAS, Paul Cohn, Benjamin Kramer, Joel Held, Louis Kulekofsky and James Sadlier were admitted to the firm as General Partners as of July 1, 1969, and

WHEREAS, Robert Sadlier was admitted to the firm as a General Partner as of August 21, 1969, and

WHEREAS, Tamar Bruckman, Frances Spector, Hilton Leff, and Max Shuster were admitted to the firm as Limited Partners on October 31, 1969, and

WHEREAS, Bertha Cannold was admitted to the firm as a Limited Partner on November 7, 1969, and

WHEREAS, Florence Heller was admitted to the firm as a Limited Partner on December 12, 1968, and

WHEREAS, Ida Hochman and Anne Berch were admitted to the firm as Limited Partners on January 16, 1969, and

WHEREAS, Bebe Prince and Bebe Morris Prince were admitted to the firm as Limited Partners on February 20, 1969, and

Exhibit 1

WHEREAS, Robert L. Feinberg was admitted to the firm as a Limited Partner on March 27, 1969, and

WHEREAS, Samuel Shabus and Lillian Tabor were admitted to the firm as Limited Partners on July 10, 1969, and

WHEREAS, Wayne J. Wynne retired from the firm as a General Partner as of December 31, 1968, and

WHEREAS, Morton Lipton and Donald J. Zadoff retired from the firm as General Partners as of February 28, 1969, and

WHEREAS, Robert J. Galardi retired from the firm as a General Partner as of March 7, 1969, and

WHEREAS, Joseph T. Murray retired from the firm as a General Partner as of March 31, 1969, and

WHEREAS, Irwin Shapiro retired from the firm as a General Partner as of May 7, 1969, and

WHEREAS, Morton H. Bohrer retired from the firm as a General Partner as of May 22, 1969, and

WHEREAS, Morris Lebovitz retired from the firm as a General Partner as of June 6, 1969, and

WHEREAS, Peter Lynch, Bert L. Gusrae, Ervin W. Schwarzmann, Leon Mayer, Jay Richard Leyner, and Albert Klein retired from the firm as General Partners as of June 30, 1969, and

WHEREAS, Louis Kulekofsky retired from the firm as a General Partner as of September 30, 1969, and

Exhibit 1

WHEREAS, Oliver Parry and Hilton Leff retired from the firm as Limited Partners as of November 30, 1968, and

WHEREAS, Alexander Konigsberg retired from the firm as a Limited Partner as of May 14, 1969, and

WHEREAS, Richard Dreskin, Bernard Dreskin, Frances Dreskin as trustee under trust agreement for benefit of (Howard P. Dreskin) (Debra Dreskin) (Dorothy Tarr, Elinor Seidel, Sidney Rothbard and Irwin Rothbard) retired from the firm as Limited Partners as of June 30, 1969, and

WHEREAS, Alma Glickman retired from the firm as of November 1, 1969, and

WHEREAS, Bernard Pidto retired from the firm as a Limited Partner as of August 30, 1969, and

WHEREAS, Julius Spector retired from the firm as a Limited Partner as of October 10, 1969, and

WHEREAS, the parties desire to amend their Articles of Limited Partnership in their entirety, to be effective as of the close of business June 30, 1969, as follows,

NOW, THEREFORE, in consideratiton of the mutual obligations hereunder, and other valuable considerations, the parties hereto agree as follows:

FIRST: The undersigned hereby continue the Limited Partnership under the name of HERTZ, WARNER & Co. with its principal place of business at 2 Broadway, New York, New York, and with branch offices located at other addresses as the firm may deem advisable from time to time,

for the purpose of acting as brokers in stocks, bonds and other securities, and to do such other business as may be permitted under the rules and regulations of the New York Stock Exchange and other national exchanges.

SECOND: The term of this agreement will commence on July 1, 1969, and shall continue until terminated, as hereinafter provided.

THIRD: (a) The General Partners in this Partnership are: HERTZ, WARNER, SALUC, CARNEY, COHN, GENNA, GILLMAN, HELD, KRAMER, LITT, MATTHEWS, J. SADLIER, R. SADLIER and SHELDON.

(b) The Limited Partners in this Partnership are: MEYER, J. BLAU, SCHIFF, THE MITCHELL ALFUS TRUST, THE WENDY ALFUS TRUST, ASARNOW, BARON, BERCH, THE BERRIE TRUST, L. BLAU, BRUCKMAN, BURACK, CANNOLD, DAITCH, FEINBERG, FELDESMAN, D. FISHER, P. FISHER, FRUMKES, GIFFUNI, GOLD, THE GOLD TRUST, GORDON, HARRISON, HELLER, HERTZ, WARNER & CO. PROFIT SHARING TRUST, HERTZ, WARNER & CO. FOUNDATION, H. HOCHMAN, I. HOCHMAN, KALMAN, KLEIN, B. KOLBERG, R. KOLBERG, LEDERMAN, LERMAN, LEVINE, S. MEYER, MILLER, MODELL, F. MOSS, H. MOSS, NAGER, B. PRINCE, B. M. PRINCE, RADER, ROSEN, ROTHAUSER, ROTHMAN, L. SCHEINMAN, R. SCHEINMAN, V. SCHEINMAN, A. SCHIFF, C. SCHNALL, M. SCHNALL, SCHNEIDER, SHABUS, M. SHUSTER, R. SCHUSTER, SILVERMAN, L. SKALET, S. SKALET, F. SPECTOR, STRUTIN, SUCHMAN, TABOR, TYLER, and YESKEL.

FOURTH: As of the effective date of this agreement, the Partners shall contribute to the capital of the firm, in either cash or securities, the following except where otherwise indicated:

Exhibit 1

GENERAL PARTNERS

Hertz	$550,000	
Warner	550,000	
Carney	200,000	
Saluc	100,000	
Cohn	100,000	
Matthews	10,000	
R. Sadlier	10,000	
Held	5,000	
Gillman	40,000	
Kramer	25,000	
Genna	5,000	
Sheldon	10,000	
Litt	10,000	
J. Sadlier	5,000	

LIMITED PARTNERS

J. Blau	$300,000	
A. Meyer	300,000	
B. Schiff	100,000	
Adler	30,000	cash
	125,000	securities
Alfus	330,000	
Mitchell Alfus Trust	10,000	cash
Wendy Alfus Trust	10,000	cash
Asarnow	110,000	
Baron	10,000	cash
Berch	20,000	cash
The Berrie Trust	37,500	
L. Blau	127,000	
Bruckman	10,000	cash

Exhibit 1

Burack	$ 75,000 cash
Cannold	20,000 cash
Cunniff	110,000
Daitch	20,000 cash
Feinberg	10,000 cash
Feldesman	10,000 cash
D. Fischer	330,000
P. Fischer	10,000 cash
	165,000 securities
Frumkes	20,000 cash
Giffuni	10,000 cash
Gold	440,000
The Gold Trust	220,000
Goldman	10,000 cash
Gordon	10,000 cash
Harrison	10,000 cash
Heller	10,000 cash
Hertz, Warner & Co. Profit Sharing Trust	125,000
Hertz, Warner & Co. Foundation	125,000
H. Hochman	30,000 cash
I. Hochman	10,000 cash
Kalman	100,000 cash
Klein	30,000 cash
B. Kolberg	10,000 cash
R. Kolberg	10,000 cash
Lederman	40,000 cash
Lerman	75,000 cash
Levine	220,000
S. Meyer	440,000
Miller	20,000 cash
Modell	20,000 cash
F. Moss	10,000 cash

Exhibit 1

H. Moss	$10,000 cash
Nager	30,000 cash
B. Prince	10,000 cash
B. M. Prince	10,000 cash
Rader	115,000
Rosen	30,000 cash
Rothauser	100,000 cash
	140,000 securities
Rothman	10,000 cash
L. Scheinman	10,000 cash
	165,000 securities
R. Scheinman	10,000 cash
V. Scheinman	10,000 cash
A. Schiff	10,000 cash
C. Schnall	20,000 cash
M. Schnall	10,000 cash
Schneider	225,000
Shabus	10,000 cash
M. Shuster	10,000 cash
R. Shuster	10,000 cash
Silverman	40,000 cash
	50,000 securities
L. Skalet	100,000 cash
S. Skalet	10,000 cash
F. Spector	10,000 cash
Strutin	10,000 cash
Suchman	20,000 cash
Tabor	10,000 cash
Tyler	75,000 cash
Yeskel	75,000 cash

In the event of the liquidation of any of the securities contributed by any Limited or General Partner, the cash resulting from such liquidation shall be retained as a capital

contribution of such partner and such partner shall have the right to acquire new securities with the cash resulting from the aforesaid liquidation.

(b) The contribution of securities made by any General or Limited Partner, shall forthwith upon receipt thereof by the Partnership, become and be Partnership property, and shall be treated for all purposes as capital contributed by said partners, provided, however, that solely for the purposes of determining the rights of the partners among themselves, all cash dividends, stock dividends, stock splits, profits, losses, and income charges in connection with such securities, shall be credited or charged to the individual account of such contributing partner, and shall not be treated as partnership income or expense, and upon the termination of the Partnership, or upon their withdrawal from the Partnership, such partners shall be considered as having claim against the Partnership with respect to such securities contributed by them which claims shall be subordinate in right of payment and subject to the prior payment or provision for payment in full claims of all present and future creditors of the Partnership arising out of any matters accruing before the Termination of such Partnership or effective retirement of a partner as provided in Article "EIGHTH", or the date fixed in Article "NINTH" hereof for the repayment of such capital. Any Limited Partner who shall have contributed securities as capital shall have the right, at any time, to withdraw all or any part of such securities upon substituting therefor other securities having a market value at the time of such substitution which is not less than that of the securities as withdrawn. All securities contributed by the partners of the firm shall be evaluated in accord with the rules and regulations of the New York Stock Exchange. The value of

the securities contributed shall be maintained by additional contributions in the event of a reduction in value. However, the failure on the part of the firm to request such additional contributions shall not be construed as a waiver of a right to do so.

(c) All interest for General and Limited Partners will be computed from the date the capital contribution is made. Interest will be paid to the General and Limited Partners on cash contributions, at the rate of six per cent (6%) per annum, or higher, to be determined by the majority of the Executive Committee, payable monthly. Interest will be paid to the General and Limited Partners on securities contributed as capital to the firm, on the net value as established under the rules of the New York Stock Exchange as of the date hereof, at a rate to be determined by a majority of the Executive Committee of the firm, payable monthly. In the event that the securities contributed shall appreciate in value, the firm shall not be obligated to pay interest on any amount in excess of the net value agreed. By action of a majority of the Executive Committee, the payment of interest to General Partners may be waived.

FIFTH: The firm shall pay to the following General Partners, as an expense of the business, the following salaries:

Hertz	$25,000 per annum
Warner	25,000 per annum
Carney	25,000 per annum
Saluc	25,000 per annum
Held	20,000 per annum
R. Sadlier	20,000 per annum
Sheldon	20,000 per annum
Litt	17,500 per annum

Exhibit 1

Genna	$16,000 per annum
Cohn	15,000 per annum
Matthews	15,000 per annum
J. Sadlier	12,000 per annum
Gillman	draw vs. production
Kramer	draw vs. production

It is understood that the amount of the abovementioned salaries of all of the General Partners as stated, may be amended by action of the majority of the Executive Committee.

SIXTH: (a) All profits and losses arising from the Partnership, excepting changes in value of securities contributed by partners and excepting changes in memberships in the New York Stock Exchange, American Stock Exchange, Midwest Stock Exchange, Philadelphia-Baltimore-Washington Stock Exchange, National Stock Exchange, Boston Stock Exchange and Pacific Coast Stock Exchange, shall be shared among the partners in the following proportions:

General Partners	*Profits*	*Losses*
Hertz	11.00%	16.55%
Warner	11.00%	16.55%
Carney	9.00%	13.53%
Saluc	9.00%	13.53%
Cohn	3.00%	4.51%
Matthews	3.00%	4.51%
R. Sadlier	2.00%	3.02%
Held	1.00%	1.50%
Sheldon	1.00%	1.50%
Genna	.50%	.75%
Litt	.50%	.75%
J. Sadler	.50%	.75%
Gillman	.50%	.75%
Kramer	.50%	.75%
	52.50%	

Exhibit 1

Limited Partners	*Profits*	*Losses*
J. Blau	6.00%	9.02%
A. Meyer	6.00%	9.02%
B. Schiff	2.00%	3.01%
		100.00%

The Limited Partners listed above shall share in any losses sustained by the firm, in the percentage indicated, but only to such extent as their stated capital contribution to the firm.

Limited Partners	*Profits*	*Losses*
Adler	.75%	No losses
Alfus	1.50%	No losses
Mitchell Alfus Trust	.10%	No losses
Wendy Alfus Trust	.10%	No losses
Asarnow	.50%	No losses
Baron	.10%	No losses
Berch	.20%	No losses
The Berrie Trust	.25%	No losses
L. Blau	.75%	No losses
Bruckman	.10%	No losses
Burack	.50%	No losses
Cannold	.20%	No losses
Cunniff	.50%	No losses
Daitch	.20%	No losses
Feinberg	.10%	No losses
Feldsman	.10%	No losses
D. Fisher	1.50%	No losses
P. Fisher	.85%	No losses
Frumkes	.20%	No losses
Giffuni	.10%	No losses
Gold	2.00%	No losses

Exhibit 1

Limited Partners	*Profits*	*Losses*
The Gold Trust	1.00%	No losses
Goldman	.10%	No losses
Gordon	.10%	No losses
Harrison	.10%	No losses
Heller	.10%	No losses
Hertz, Warner & Co. Profit Sharing Trust	.75%	No losses
Hertz, Warner & Co. Foundation	.75%	No losses
H. Hochman	.30%	No losses
I. Hochman	.10%	No losses
Kalman	1.00%	No losses
Klein	.30%	No losses
B. Kolberg	.10%	No losses
R. Kolberg	.10%	No losses
Lederman	.40%	No losses
Lerman	.50%	No losses
Levine	1.00%	No losses
S. Meyer	2.00%	No losses
Miller	.20%	No losses
Modell	.20%	No losses
F. Moss	.10%	No losses
H. Moss	.10%	No losses
Nager	.30%	No losses
B. Prince	.10%	No losses
B. M. Prince	.10%	No losses
Rader	.50%	No losses
Rosen	.30%	No losses
Rothauser	1.50%	No losses
Rothman	.10%	No losses
L. Scheinman	.85%	No losses
R. Scheinman	.10%	No losses
V. Scheinman	.10%	No losses

Exhibit 1

Limited Partners	*Profits*	*Losses*
A. Schiff	.10%	No losses
C. Schnall	.20%	No losses
M. Schnall	.10%	No losses
Schneider	1.00%	No losses
Shabus	.10%	No losses
M. Shuster	.10%	No losses
R. Shuster	.10%	No losses
Silverman	.50%	No losses
L. Skalet	1.00%	No losses
S. Skalet	.10%	No losses
F. Spector	.10%	No losses
Strutin	.10%	No losses
Suchman	.20%	No losses
Tabor	.10%	No losses
Tyler	.50%	No losses
Yeskel	.50%	No losses
	42.65%	

(b) J. Blau, A. Meyer and B. Schiff shall be liable for losses arising from the Partnership, as scheduled herein, only to the extent of their capital contribution to the Partnership, after which time, the General Partners of the Partnership shall participate in the additional losses arising from the Partnership in proportion and relation to such General Partner's participation in the profits arising from the Partnership, which shall be on a pro rata basis which shall equal 100% of such additional losses.

(c) The partners agree that a float of 4.85% of the net profits may remain unallocated until the close of the Partnership's calendar year, unless new partners are admitted in the interim, at which time distribution thereof may be determined by the majority of the Executive Committee.

(d) Any losses sustained by the Partnership as a result of a wrongful act or gross negligence of any partner shall be charged against the partner causing the same.

SEVENTH: *Exchange Membership*

(A) For the purposes of this paragraph (Seventh (A)) SHELDON and GENNA shall be referred to as SHELDON/GENNA. However, the terms of this agreement shall be binding upon SHELDON and GENNA, as individuals and nothing herein shall be intended to mean that the obligations of one of the individuals, shall be contingent upon or, in any way dependent upon the obligations of the other.

SHELDON/GENNA, who is a member of the New York Stock Exchange in good standing, agrees as such member of the New York Stock Exchange, to continue such membership until the termination or dissolution of the firm or until his death or incompetency, whichever event occurs first, and he shall contribute to the Partnership the use and overall rights and benefits of such membership in the New York Stock Exchange. He shall not be entitled to any allowance of interest by reason of such contribution. He shall not sell or otherwise dispose of such membership as long as the use thereof is contributed by him to the Partnership as herein provided. All expenses of such membership, so long as the same shall be contributed to the use of the Partnership, shall be charged as an expense of the business to the Partnership.

SHELDON/GENNA, agrees, so far as may be necessary for the protection of the creditors of the firm, and subject to the Constitution and Rules of the New York Stock Exchange, that the proceeds of the transfer of his membership shall be an asset of the Partnership.

Exhibit 1

Upon the firm ceasing to be a member firm of the New York Stock Exchange, or upon the receipt by SHELDON/GENNA or his legal representative of written notice that the firm will, on a stated date cease to be a member firm, or terminate the Partnership Agreement, or upon the receipt of notice of the member retiring from the firm, or upon his death, incompetency, expulsion from membership in any Exchange or his adjudication of insolvency:

SHELDON/GENNA or his legal representative shall have the unqualified right during a period of thirty days thereafter, except that in the case of death or incompetency of SHELDON/GENNA such period shall be deemed to expire ten days after the appointment of the representative or committee for SHELDON/GENNA, to elect, by giving written notice thereof to the Executive Committee of the Partnership, to retain such membership in the New York Stock Exchange, upon payment to the Partnership of the amount necessary to purchase another membership, together with such transfer and other fees as may be required by the Exchange to be paid in connection with the purchase of the membership. Upon the firm receiving notice in writing within the period mentioned, that SHELDON/GENNA or his legal representatives elect not to retain said membership, or upon the expiration of said period without such notice of election to retain, or notice of election not to retain, having been given to the Executive Committee of the Partnership, then SHELDON/GENNA, his legal representatives or the committee, shall forthwith, at the direction of the majority of the Executive Committee of the firm either,

(a) Sell said membership and pay the proceeds over to the firm or,

(b) Transfer such membership to a person designated by the majority of the Executive Committee

of the firm, and satisfactory to the Board of Governors of said Exchange.

Upon the disposition of such membership, the appreciation or depreciation thereof shall be credited or debited among the General Partners of the firm in proportion to their capital contributions. In no event shall SHELDON/GENNA receive less than one-half of that amount which he would receive if all General Partners were to share equally.

In the event of the death of SHELDON/GENNA, the Partnership shall be entitled to have the use of such membership on the New York Stock Exchange from the date of his death until the termination of the status of such continuing or new firm or until a member of the Exchange is admitted to such firm as a General Partner, and, insofar as may be necessary for the protection of creditors of the new or continuing firm, and subject to the Constitution and Rules of the Exchange, the proceeds of his membership shall be an asset of the continuing Partnership during such period, and any claims of his Estate thereto shall be fully and completely subordinated to any and all creditors of such continuing Partnership or of both the present and the new Partnership.

(B) For the purposes of this paragraph (Seventh (B)) LITT and J. SADLIER shall be referred to as LITT/J. SADLIER. However, the terms of this agreement shall be binding upon LITT and J. SADLIER, as individuals and nothing herein shall be intended to mean that the obligations of one of the individuals shall be contingent upon or, in any way dependent upon the obligations of the other.

LITT/J. SADLIER, who is a member of the American Stock Exchange in good standing, agrees as such a member of the American Stock Exchange, to continue such member-

ship until the termination or dissolution of the firm, or until his death or incompetency, whichever event occurs first, and he shall contribute to the Partnership the use and overall rights and benefits of such membership in the American Stock Exchange. He shall not be entitled to any allowance of interest by reason of such contribution. He shall not sell or otherwise dispose of such membership as long as the use thereof is contributed by him to the Partnership as herein provided. All expenses of such membership, so long as the same shall be contributed to the use of the Partnership, shall be charged as an expense of the business to the Partnership.

LITT/J. SADLIER agrees, so far as may be necessary for the protection of the creditors of the firm, and subject to the Constitution and Rules of the American Stock Exchange, that the proceeds of the transfer of membership shall be an asset of the Partnership.

Upon the firm ceasing to be a member firm of the American Stock Exchange, or upon the receipt by LITT/J. SADLIER or his legal representative of written notice that the firm will, on a stated date cease to be a member firm, or terminate the Partnership Agreement, or upon the receipt of notice of the member retiring from the firm, or upon his death, incompetency, expulsion from membership in any Exchange, or his adjudication of insolvency:

LITT/J. SADLIER or his legal representative shall have the unqualified right during a period of thirty days thereafter, except that in the case of death or incompetency of LITT/J. SADLIER such period shall be deemed to expire ten days after the appointment of the legal representative or committee for LITT/J. SADLIER to elect, by giving written notice thereof to the Executive Committee of the Partnership, to retain such membership in the American Stock

Exchange upon payment to the Partnership of the amount necessary to purchase another membership, together with such transfer and other fees as may be required by the Exchange to be paid in connection with the purchase of the membership. Upon the firm receiving notice in writing within the period above mentioned, that LITT/J. SADLIER, or his legal representatives elect not to retain said membership, or upon the expiration of said period without such notice of election to retain, or notice of election not to retain having been given to the Executive Committee of the Partnership then LITT/J. SADLIER, his legal representatives or committee, shall forthwith, at the direction of the majority of the Executive Committee of the firm

(a) sell said membership and pay the proceeds over to the firm, or

(b) transfer such membership to a person designated by the majority of the Executive Committee of the firm, and satisfactory to the Board of Governors of said Exchange.

Upon the disposition of such membership, the proceeds thereof shall be distributed among the General Partners of the firm in proportion to their capital contributions.

In the event of the death of LITT/J. SADLIER, the Partnership shall be entitled to have the use of such membership on such Exchange from the date of his death until the termination of the status of such continuing or new firm or until a member of the American Stock Exchange is admitted to such firm as a General Partner, and, insofar as may be necessary for the protection of creditors of the new or continuing firm, and subject to the Constitution and Rules of the Exchange, the proceeds of his member-

ship shall be an asset of the continuing Partnership during such period, and any claims of his Estate thereto shall be fully and completely subordinated to any and all creditors of such continuing Partnership or of both the present and the new partnership.

(C) CARNEY, who is a member, in good standing, of the Midwest Stock Exchange, the Boston Stock Exchange and the Pacific Coast Stock Exchange, and WARNER, who is a member in good standing of the Philadelphia-Baltimore-Washington Stock Exchange and the National Stock Exchange, individually agree as such members of the named Exchanges:

To continue such membership until the termination or dissolution of the firm, or until his death or incompetency, whichever event occurs first, and he shall contribute to the Partnership the use of overall rights and benefits of such membership. He shall not be entitled to any allowance of interest of such contribution. He shall not sell or otherwise dispose of such membership as long as the use thereof is contributed by him to the Partnership as hereinbefore provided. All expenses of such membership, so long as the same shall be contributed to the use of the Partnership, shall be charged as an expense of the business to the Partnership.

So far as may be necessary for the protection of the creditors of the firm, and subject to the Constitution and Rules of the particular Exchange, the proceeds of the transfer of his membership shall be an asset of the Partnership.

Upon the firm ceasing to be a member firm of the particular Exchange, or upon the receipt by CARNEY and/or WARNER, or their respective legal representative of written notice that the firm will, on a stated date cease to be a

member firm, or terminate the Partnership Agreement, or upon the receipt of notice of the member retiring from the firm, or upon his death, incompetency, expulsion from membership in any Exchange, or his adjudication of insolvency:

CARNEY and/or WARNER or his legal representative shall have the unqualified right during a period of thirty days thereafter, except that in case of his death or incompetency, such period shall be deemed to expire ten days after the appointment of the legal representative or committee for the member, to elect, by giving written notice thereof to the Executive Committee of the Partnership, to retain such membership in the Particular Exchange upon payment to the Partnership of the amount necessary to purchase another membership, together with such transfer and other fees as may be required by the Exchange to be paid in connection with the purchase of the membership. Upon the firm receiving notice in writing within the period above mentioned, that CARNEY and/or WARNER or his legal representatives elect not to retain said membership, or upon the expiration of said period without such notice of election to retain, or notice of election not to retain having been given to the Executive Committee of the Partnership, then CARNEY and/or WARNER, his legal representatives or committee, shall forthwith, at the direction of the majority of the Executive Committee of the firm, either

(a) sell said membership and pay the proceeds over to the firm, or

(b) transfer such membership to a person designated by the majority of the Executive Committee of the firm, and satisfactory to the Board of Governors of said Exchange.

Exhibit 1

Upon the disposition of such membership, the proceeds thereof shall be distributed among the General Partners of the firm in proportion to their capital contributions.

In the event of the death of CARNEY and/or WARNER, the Partnership shall be entitled to have the use of such membership on such Exchange from the date of his death until the termination of the status of such continuing or new firm or until a member of the particular Exchange is admitted to such firm as a General Partners, and, insofar as may be necessary for the protection of creditors of the new or continuing firm, and subject to the Constitution and Rules of the Exchange, the proceeds of his membership shall be an asset of the continuing Partnership during such period, and any claim of his Estate thereto shall be fully and completely subordinated to any and all creditors of such continuing Partnership or of both the present and the new Partnership.

EIGHTH: (a) Any Limited Partner of the firm may retire at any time by giving ninety days written notice to the Executive Committee, of his intention to retire, which notice shall be mailed to the members of the Executive Committee of the firm at the address given above, and the retirement of said Limited Partner shall be effective ninety days after the mailing of such notice, or on the last day of the fiscal quarter in which such notice is given, whichever is later.

(b) Upon the effective date of the retirement of a Limited Partner, as specified in paragraph Eighth (a) herein, such retired Limited Partner shall be entitled to receive the amount of his capital contribution if such contribution was in cash.

Exhibit 1

(c) Any General Partner of the firm may retire at any time by giving ninety days written notice to the Executive Committee of his intention to retire, which notice shall be mailed to the members of the Executive Committee of the firm at the address given above, and the retirement of said General Partner shall be effective ninety days after the mailing of such notice, or on the last day of the fiscal quarter in which such notice is given whichever is later. In the event that any General Partner retires from the firm, the name and goodwill of the firm shall have no value in computing his distributive share of the assets of the firm.

(d) In the event of the retirement of any General Partner, (for the purposes of this Agreement the adjudication in bankruptcy of any partner or expulsion of any partner from membership in any Exchange, shall be treated the same as if such partner had retired as of date of adjudication or expulsion) such General Partner's interest in the net profits of the Partnership shall terminate on the date of his or her retirement and his or her capital contribution shall be returned to him or to her on said date, less his or her share of the losses, if any chargeable to such General Partner. The remainder of such partner's distributive share of the net assets including his or her share of the net profits shall be paid to such partner not less than ninety (90) days from the date of such retirement. In the event of the retirement of a partner who has contributed securities as all or part of his capital contribution, such partner shall have the right to demand and receive on account for the return of his capital contribution, securities of issues which such partner contributed to the capital of the Partnership.

(e) In the event of the retirement of any General or Limited Partner hereto, prior to the execution of a new

partnership agreement, the Executive Committee of the firm, or any member of the firm designated by the Executive Committee, shall have the full power and authority to sign, for said retiring partner, a new partnership agreement or amendment thereto, which agreement or amendment notes the retirement of said retiring partner.

NINTH: In the event of the death or adjudication of incompetency of any General or Limited Partner during the partnership term, the Partnership shall not terminate and the capital contributed by such partner shall remain with the Partnership for ninety days from the last day of the month in which he died or was adjudicated. At the option of the remaining General Partners, this capital may be returned at any time during said ninety-day period on ten days notice to the legal representatives of the Estate of said deceased partner. During the period that the capital contributed by such decreased or incompetent partner remains with the Partnership, the Committee for such incompetent, or his legal representative, shall be entitled to interest at the rate of six (6%) per cent per annum on the total value of the capital retained by the firm, payable monthly to his legal representative, and his interest in the profits and losses of the firm shall cease as of the last day of the month in which his death occurred or in which he was adjudicated incompetent. The majority of the Executive Committee of the firm shall have the right to distribute the interest of said deceased or incompetent partner in profits and losses of the firm to the General Partners as they deem advisable. In the event of the death or adjudication of incompetency of any General or Limited Partner during the Partnership term, the capital contribution and interest of said deceased or incompetent partner, until the repayment thereof to his legal or personal representatives, shall remain with the

Exhibit 1

Partnership at the risk of the business and shall be considered as capital of the Partnership, in the same manner and to the same extent as the capital contributed by a Limited Partner, and any claims of the personal representatives of said incompetent or deceased partner thereto shall be subordinate in right of payment and subject to the prior payment or provision for payment in full of claims of all present or future creditors of the Partnership arising out of any matter occurring prior to the date herein fixed for the repayment of such capital and interest.

TENTH: During the existence of the Partnership, true and correct books of account shall be kept and such books shall, at all times, be accessible to any of the partners at all reasonable business hours and be open to the inspection of any legal representatives of any deceased partner or by any person by him thereto authorized.

ELEVENTH: (a) In the exercise of their respective functions, the General Partners shall diligently devote substantially all of their full time to and employ themselves in the business of the Partnership and shall be faithful to each other in all transactions relating to the firm, and give, whenever required, a true account of all business transactions arising out of or connected with the conduct of the Partnership and shall not, without the written consent of all the other General Partners, employ either the capital or the credit of the Partnership in any business other than the said Partnership business. Each of the General Partners agree that he will not do any act detrimental to the best interests of the Partnership, or which would make it impossible to carry on the ordinary business of the Partnership. Each General Partner shall punctually pay his individual debts and liabilities, and shall at all times keep indemnified the other partners and the assets of the Partnership, against the same.

Exhibit 1

(b) It is further agreed that the majority of the Executive Committee shall have the final decision with regard to the policies of the firm and the business or the management thereof, including the sale of various assets of the firm, without notice, not amounting to the final dissolution of the firm, and shall have the final decision with reference to any dispute which may arise as the result of its business or policy decisions, and shall also have the right to terminate the Partnership on ninety days notice to all partners and to add additional General or Limited Partners to the firm, as well as request the retirement of any General or Limited Partner on ninety days notice.

(c) The Executive Committee shall consist of the following General Partners: HERTZ, WARNER, SALUC and CARNEY. The numerical majority of the Executive Committee shall have all powers to direct the operations of this firm in accord with the terms and provisions set forth in this Agreement.

TWELFTH: Each of the General Partners agrees with the others that during continuance of this Partnership he will not make, endorse or accept, in the firm's name or in his individual name, any note, bill, draft or check as accommodation for any person or persons whatsoever, or enter into any bond as surety or guarantor, or otherwise become surety for any person or persons whatsoever, or make use of the firm name in any way except in the business and for the benefit of said firm, or make or endorse any notes, bills or drafts in his individual name, without the written consent of the majority of the Executive Committee.

All of the partners agree that any one or all of the General Partners may, during the continuance of the Partnership, for his own account and benefit enter into any

transaction (either in his own name or any other name) involving the purchase or sale of any stocks, bonds, securities, commodities, options, or rights of any sort in respect thereto even where such transaction or transactions may deprive the Partnership of an opportunity for Partnership profit, provided, however, that the time devoted to such transaction or transactions will be insubstantial, and the General Partners involved will nevertheless devote substantially all of their full time to and employ themselves in the business of the Partnership.

The Partners hereby certify to each other that they have no outstanding indebtedness or lawsuits pending of which they have not advised their co-partners, and they hereby agree to advise their co-partners without delay of any litigation which may be started against them.

THIRTEENTH: The General Partners hereto agree that all securities, cash and other property of any kind or nature and all interests therein which may from time to time be held by the Partnership for each such partner respectively, or in his behalf, (including all securities, cash or other property segregated, or in a safekeeping account) shall forthwith, upon the receipt thereof by the Partnership, become and be Partnership property, and shall be treated for all purposes as capital contributed by him, provided, however, that solely for the purpose of determining the rights of the partners among themselves, all profits, losses, income and charges in connection with such securities, cash, property and interests therein shall be credited or charges to each partner's respective individual account and shall not be treated as Partnership income or expense, and upon the termination of the Partnership, or upon his ceasing to be a Partner therein. for any reason, he shall be considered as having a claim against the firm with respect to such securities, cash property and interests therein,

which claims shall be subordinate in right of payment and subject to the prior payment or provision for payment in full of claims of all present and future creditors of the Partnership (and any successor Partnership in which he may be a General Partner), arising out of any matters occurring before the termination of such Partnership (or successor Partnership) or his ceasing to be a partner therein for any reason.

The partners shall be privileged, at any time, with the consent of the majority of the Executive Committee, to make withdrawals, in whole or in part, or to substitute cash for securities, securities for cash, and securities for other securities in excess of their capital contributions hereinbefore set forth. All substitutions shall be for cash or securities of equal value as of the time of such substitution.

FOURTEENTH: The firm shall pay such business expenses of the General Partners, and in such amounts, as shall be approved by the majority of the Executive Committee. In addition to such expenses it is recognized that the General Partners incur business expenses which, because of their character, are not susceptible to precise computation and accounting. This category includes some personal contact and entertainment expenses which are very important to the Partnership business and which are incurred by the General Partners at their homes, clubs, and other places of entertainment. Also included are miscellaneous business expenses such as telephone calls, taxis, tips, gifts, etc., which are intermingled with the General Partners' personal expenses. Instead of charging these expenses to the firm, with the resulting uncertainty as to items and amounts, the General Partners have agreed to bear such expenses out of their own funds. The distributive shares

of firm income provided for in the Partnership Agreement have been established bearing in mind the fact that the business expenses described herein are to be paid for by the partners individually.

FIFTEENTH: (a) The General and Limited Partners of the firm do hereby appoint HERTZ, WARNER, SALUC and CARNEY as a Special Committee of the partners, which Committee shall have full power and authority on behalf of the partners of this firm, at any time and from time to time to (1) designate one or more of the employees of the firm to assign securities registered in the name of the firm, to execute powers of substitution, and to guarantee the signatures of others to assignments of securities, with the same effect as if the name of the firm had been signed under like circumstances by one of the General Partners of the firm, (2) to adopt and authorize the use of a mechanically reproduced facsimile signature of the firm in connection with the assignment of securities registered in the name of the firm, (3) to designate one or more of the employees of this firm to sign written contracts covering "seller's option," "when issued," and "when distributed" transactions in the name of the firm with the same effect as if the name of the firm had been signed under like circumstances by one of the General Partners of the firm, and (4) to execute and file with any National Securities Exchange, in the name and on behalf of this firm, and the several partners thereof, any and all such powers of attorneys, agreements and other instruments (including agreements of indemnification) as may by any such Exchange be required to evidence action under (1), (2) or (3) above.

(b) Each partner upon executing these Articles of Limited Partnership, specifically ratifies and approves all such powers of attorney, agreements and other instruments

(including agreements of indemnification) as may heretofore have been executed and filed on behalf of this firm with any National Securities Exchange and which are still in force, in connection with designating one or more employees of this firm to assign securities registered in the name of the firm and to guarantee the signature of others to assignments of securities, in connection with adopting a mechanically reproduced facsimile seignature for use as the signature of the firm, or in connection with designating one or more employees of this firm to sign written contracts covering "seller's option," "when issued" and "when distributed" transactions in the name of the firm.

(c) Any three of said committee may act for said firm of HERTZ, WARNER & Co. with the same force and effect as if the four members had acted.

SIXTEENTH: In the event of the dissolution of the Partnership the business of the Partnership shall be liquidated in accord with the Limited Partnership laws of the State of New York. Such liquidation shall be commenced immediately upon the date of such dissolution and shall be completed as expeditiously as possible. Such liquidation shall be conducted by HERTZ, WARNER, SALUC and CARNEY, who shall act without compensation. For the purpose of liquidation the firm name shall not be regarded as an asset, and the right to use the name of HERTZ, WARNER & Co. shall be the sole property of HERTZ and WARNER. In the event of the incompetence and/or death of HERTZ or WARNER, the name of the firm shall become the property of the surviving partner, whose name appears therein.

SEVENTEENTH: Any notice required hereunder to be given to any party hereto may either be served personally upon him or may be sent by registered mail to his last

known post-office address as shown on the records of the Partnership. Such notice shall be deemed to have been given when so served or upon the expiration of forty-eight hours after such mailing. Except as otherwise specifically provided in this Agreement, notice to any General Partner shall be deemed to constitute notice to the Partnership.

EIGHTEENTH: Any controversy arising out of or relating to this Agreement or the breach thereof shall be submitted to and settled by a Board of Arbitration appointed by the Board of Governors of the New York Stock Exchange and said arbitration proceedings shall be conducted in accordance with the rules and regulations of the New York Stock Exchange. The parties hereto for and on behalf of themselves and all who may claim under them shall be conclusively bound by the decision of the Board of Arbitration.

NINETEENTH: This Agreement shall in all respects bind and inure to the benefit of the parties hereto and their respective heirs, executors, administrators and assigns to the extent set forth herein.

TWENTIETH: Notwithstanding any other provision of this agreement, it is agreed that the investment by the partnership in Hertz, Warner Affiliated Corp. ("Affiliated Corp.") be carried at the amount invested therein by the partnership and that, upon termination of a partner's interest in the partnership the amount due him from his interest in the Affiliated Corp. shall be the result of the application of the percentage listed in his name in Schedule A & B attached hereto, to the amount of earned surplus of the Affiliated Corp. as of termination date.

For the purpose of this computation, the earned surplus of the Affiliated Corp. shall mean the earned surplus as adjusted to reflect operations to the termination date, re-

duced by the amounts of said earned surplus due to others, but without the requirement to increase said earned surplus for unrealized options, rights, warrants or other potential assets such as patents, etc. Good will and all assets not reflected on the books of account shall be valued at $1.00. Contingent liabilities shall be taken into account at an amount determined by the Executive Committee of the Partnership.

SCHEDULE A—GENERAL PARTNERS OF THE PARTNERSHIP

Name	*Profits*
Hertz	18.60%
Warner	18.60%
Carney	15.21%
Saluc	15.21%
Cohn	5.07%
Matthews	5.07%
R. Sadlier	3.39%
Held	1.70%
Sheldon	1.70%
Genna	.84%
Litt	.84%
J. Sadlier	.84%
Gillman	.84%
Kramer	.84%

SCHEDULE B—LIMITED PARTNERS

Name	*Profits*
J. Blau	1.58%
A. Meyer	1.58%
B. Schiff	.53%
Adler	.20%

Exhibit 1

Name	*Profits*
Alfus	.40%
Mitchell Alfus Trust	.03%
Wendy Alfus Trust	.03%
Asarnow	.13%
Baron	.03%
Berch	.05%
The Berrie Trust	.06%
L. Blau	.20%
Bruckman	.03%
Burack	[illegible]%
Cannold	.05%
Cunniff	.13%
Daitch	.05%
Feinberg	.03%
Feldesman	.03%
D. Fisher	.40%
P. Fisher	.22%
Frumkes	.05%
Giffuni	.03%
Gold	.50%
The Gold Trust	.26%
Goldman	.03%
Gordon	.03%
Harrison	.03%
Heller	.03%
Hertz, Warner & Co. Profit Sharing Trust	.20%
Hertz, Warner & Co. Foundation	.20%
H. Hochman	.08%
I. Hochman	.03%
Kalman	.26%
Klein	.08%

Exhibit 1

Name	*Profits*
B. Kolberg	.03%
R. Kolberg	.03%
Lederman	.10%
Lerman	.13%
Levine	.26%
S. Meyer	.50%
Miller	.05%
Modell	.05%
F. Moss	.03%
H. Moss	.03%
Nager	.08%
B. Prince	.03%
B. M. Prince	.03%
Rader	.13%
Rosen	.08%
Rothauser	.40%
Rothman	.03%
L. Scheinman	.22%
R. Scheinman	.03%
V. Scheinman	.03%
A. Schiff	.03%
C. Schnall	.05%
M. Schanll	.03%
Schneider	.26%
Shabus	.03%
M. Shuster	.03%
R. Shuster	.03%
Silverman	.13%
L. Skalet	.26%
S. Skalet	.03%
F. Spector	.03%

Exhibit 1

Name	*Profits*
Strutin	.03%
Suchman	.05%
Tabor	.03%
Tyler	.13%
Yeskel	.13%

Twenty-first: This agreement may be executed in counterparts, all of which, taken together, shall be deemed one original.

In Witness Whereof, the parties hereto have hereunto set their hands as of the day and year above written.

General Partners

.....	.....
Irving E. Hertz	R. Sadlier
	Joel Held
.....	.....
Henry Warner	Joel Held
.....	.....
Norman F. Carney	Kenneth Sheldon
.....	.....
Jay Saluc	Vincent Genna
Paul Cohn	Milton Litt
.....	.....
Paul Cohn	Milton Litt
Charles Matthews	
.....	.....
Charles Matthews	James Sadlier

Exhibit 1

Martin L. Gillman	Benjamin Kramer

LIMITED PARTNERS

Joseph Blau	Florence Baron
Arthur Meyer	Anne Berch
Benjamin I. Schiff	Elena Berrie I/T/F Elena Berrie
Louis S. Adler	Max Walker I/T/F Elena Berrie
Marjorie Alfus	Lawrence M. Blau
Sydelle Meyer I/T/F Mitchell Alfus	Tamar Bruckman
Sydelle Meyer I/T/F Wendy Alfus	Molly Burack
Barney Asarnow	Bertha Cannold
Leo G. Cunniff	Sol Goldman

Exhibit 1

.....	.....
Hilda Daitch	Norman Gordon
.....	.....
Robert L. Feinberg	Reta Harrison
.....	.....
Walter Feldesman	Florence Heller
	Hertz, Warner & Co. Profit Sharing Trust
.....	
Diana Fisher	By .....
	Irving E. Hertz
.....	
Philip Fisher	By .....
	Norman F. Carney
.....	
Lewis B. Frumkes	By .....
	Henry Warner
	Trustees
.....	
Alice Giffuni	Hertz, Warner & Co. Foundation
.....	By .....
Melvin Gold	Irving E. Hertz

Exhibit 1

.....	By .....
Irving Tobin I/T/F Nina, Charles and Ronald Gold	Norman F. Carney
By	.....
Henry Warner	Selda Levine
By	.....
Jay Saluc	Sydelle Meyer
Trustees	
.....	.....
Henry Hochman	Ruth Miller
.....	.....
Ida Hochman	Frances Modell
.....	.....
Henry Kalman	Francine Moss
.....	.....
Elizabeth Klein	Henry Moss
.....	.....
Beatrice Kolberg	Edward Nager
.....	.....
Rita A. Kolberg	Bebe Prince
.....	.....
Max Lederman	Bebe Morris Prince
.....	.....
Murray Lerman	Stanley Rader
.....	.....
Irving Rosen	Samuel Shabus
.....	.....
Helen Rothauser	Max Shuster

Exhibit 1

A. Allen Rothman	Robert Shuster
Leonard Scheinman	Milton Silverman
Richard Paul Scheinman	Lucile A. Skalet
Victor David Scheinman	Steven Skalet
Annette Schiff	Frances Spector
Charles Schnall	Barbara Strutin
Matty Schnall	Ruth Suchman
Richard Schneider	Lillian Tabor
Sidney Tyler	Stanley Yeskel

RETIRED PARTNERS

Wayne J. Wynne	Bert L. Gusrae
Morton Lipton	Ervin W. Schwarzmann
Donald J. Zadoff	Leon Mayer
Robert J. Galardi	Jay Richard Leyner
Joseph T. Murray	Albert Klein

Exhibit 1

Irwin Shapiro	Louis Kulekofsky
Morton H. Bohrer	Oliver Parry
Morris Lebovitz	Hilton Leff
Peter Lynch	Alexander Konigsberg
Richard Dreskin	Alma Glickman
Bernard Dreskin	Bernard Pidto
Frances Dreskin As Trustee under Trust Agreement for Benefit of (Howard P. Dreskin) (Dorothy Tarr, Elinor Seidel, Sidney Rothbard and Irwin Rothbard)	Julius Spector

---

Plaintiff's Exhibit 2

LETTER OF PEERLESS MILLS, INC. TO

AMERICAN TELEPHONE & TELEGRAPH CO.

(Post-Marked Jul. 7 '70 Registered R.R.R.)

(PHOTOSTAT)

(See opposite ☛)

Peerless Mills, Inc.
C/o Mr. A.C. Fine
5750 Collins Avenue
Miami Beach, Florida.

Miss Clundt
American Telephone & Telegraph Co.
Treasury Dept.
Stocks & Bond Division
195 Broadway
New York City, New York 10007

Ref. 2000 shares AT & T
Certificate #0471 - 0429

Dear Miss Clundt,

Confirming our oral instructions of July 7, 1970, you are hereby instructed to place a " stop transfer " on the above referenced certificate registered in the name of Peerless Mills, Inc. This " stop transfer " is to remain until further written notice from the undersigned.

Kindly send me written confirmation of the above request.

Very truly yours,

Peerless Mills, Inc.

A C Fine

by: A.C. Fine, President

~~Deft.~~ Exh. 41 id.
Plft. Exh. .....
C. A. Michaelini, C.S.R.

ONLY COPY AVAILABLE

6-7-71

PEERLESS MILLS CO.

Mr. A.C. Fine
5750 Collins Avenue
Miami Beach, Florida

ONLY C

Deliver to addressee only

REGISTERED
54196
RETURN RECEIPT REQUESTED
Registered mail REQUESTED

Miss Clundt
American Telephone & Telegraph Co.
Treasury Dept.
Stocks & Bond Division
195 Broadway
New York City, New York 10007

Return receipt requested

OPY AVAILABLE

51 :

3 49a - 350a

Plaintiff's Exhibit 3

NEW YORK STOCK EXCHANGE

DEPARTMENT OF MEMBER FIRMS

4 New York Plaza

at Broad and Water Streets

New York, N. Y. 10004

May 1, 1970

Hertz, Warner & Co.
Two Broadway
New York, New York 10004

Attention: Mr. Robert D. Sadlier

Gentlemen:

We have enclosed for your information a copy of the report that was prepared in connection with the recent visit made to your organization by the Exchange.

The report is based on a review of your books and records as well as discussions with appropriate personnel. If in your review you note any point of information or comment that does not appear factual, please let us know. In addition, we invite any other comments you may have on this report.

Thank you for your cooperation.

On Page 1, a few areas were noted by our examiners as not being properly handled by your organization in its calculation of its capital position. As such we would appreciate your confirming that if similar items exist in future computations the correct treatment will be accorded them.

JUL 15 1970

Exhibit 3

Your firm's capital position as of January 30, 1970 was as follows:

Aggregate Indebtedness	$16,743,000
Net Capital	892,000
Ratio	1878%
Ratio of non-exempt securities to excess Net Capital	95.0–1

As you are no doubt aware, the Exchange considers this capital ratio and ratio of non-exempt securities to excess Net Capital an important guideline of an organization's capital position. When such exceeds 1500% and 10.0-1, we feel the organization is highly vulnerable to a capital violation. Hence, we are interested in learning what steps have been or will be taken to restore your organization's margin of safety by reducing these ratios to below 1500% and 10.0-1 respectively.

Additionally, would you please supply us with your firm's latest capital position—supplying us with Aggregate Indebtedness, Net Capital, Capital Ratio, Ratio of non-exempt securities to excess Net Capital.

On Page 3, the examiner mentions that Alma Glickman is a proposed subordinated lender. In this regard, are you now in a position to supply us with the required documentation evidencing this subordinated loan.

The last paragraph on Page 5 and first paragraph on Page 6 indicated several security positions that remained unsegregated for one month. In this regard would you please advise us of the progress that you have made in properly segregating these positions.

Additionally, the examiner points out that these unsegregated securities are being used for bank loan col-

lateral. In this regard would you please advise us of the cause of this situation, and the steps taken to insure that in the future customers' fully paid securities are promptly segregated.

The last paragraph on Page 7 and continuing on Page 8 points out your organization's problems in reconciling detail dividend records with general ledger accounts. In this regard would you advise us of the progress that you have made in determining the receivables relative to 1969 dividends and collecting them as they are established.

On Page 9, paragraph 3 the examiner indicates that Paul Cohn has a borrowing for "capital" purposes. In this regard will you please supply us with the required documentation evidencing this "capital" borrowing. As a point of information the proceeds of this loan cannot be considered "good capital" until the loan has been approved by the Exchange.

If you have any questions please do not hesitate to contact me.

Very truly yours,

David O'Connell
DAVID O' CONNELL
Finance Specialist

Enc.

Exhibit 3

NEW YORK STOCK EXCHANGE

DEPARTMENT OF MEMBER FIRMS

March 19, 1970

Report on Visit to Messrs. Hertz, Warner & Co.
Re: Current Capital Computation

The firm's computation of its capital position as of January 30, 1970, prepared by Mr. Raymond Novak, controller, was prepared substantially in accordance with Rule 325 (Capital Requirements). Amounts and security positions used in this computation were found to be in substantial agreement with the books and records, except for the following:

NET CAPITAL

Not included—additions:

1.	General partner—equity	$ 10,080

Not included or Erroneously included—deductions:

1.	Limited partners credits included twice	$ 50,000
2.	Limited partners credits paid out during January, 1970	40,000
3.	Cash margin deficiency—customers	25,800
4.	Decrease relative to firm accounts	16,065
5.	Buy-in loss	16,038
6.	Difference in undistributed loss	7,655
		$ 155,558

Exhibit 3

AGGREGATE INDEBTEDNESS

Not included:

1. Customer credits	$1,102,459
2. Bank overdrafts	151,096
	$1,253,555

Erroneously included:

1. Limited partners and subordinated lenders—credits	$ 271,337
2. Excess credits applicable to the securities shipped draft attached account	70,140
3. Difference in accrued expenses	11,020
4. General partner credit	6,774
	$ 359,271

After giving effect to the foregoing, the firm's capital position at January 30, 1970 was approximately as follows:

Aggregate Indebtedness		$16,743,000
Net Capital		892,000
Ratio		1,878%
Commitments:		
30%	$5,228,000	
10%	141,000	
7½%	262,000	
5%	110,000	
4%	45,000	
1%	190,000	
–0–	215,000	6,191,000

Exhibit 3

The ratio of non-exempt commitments to excess Net Capital was 95 to 1. The total non-exempt securities of $5,227,593 is categorized as follows:

General partners	$ 799,232
Limited partners	1,671,833
Subordinated lenders	2,008,943
Firm	696,343
Partly secured customers accounts	51,242
	$5,227,593

Included in the foregoing capital computation are the following general partners individual accounts included in accordance with the firm's partnership agreement:

	Ledger		*Long Valuation*	
	Debit	*Credit*	*Non-Exempts*	*Exempts*
Irving E. Hertz	$16,514.50		$ 144,000	$ 347,000
Henry Warner		$118,972.14	462,400	
Paul Cohn			94,000	
David Warner	375.00		81,300	
Norman F. Carney		39,758.64	15,582	
Joel Held		3,245.73	1,950	
	$16,889.50	$161,976.51	$ 799,232	$ 347,000

Exhibit 3

Also included in the aforementioned capital computation are the following subordinated accounts:

	Ledger		*Long Valuation*	
Lender	*Debit*	*Credit*	*Non-Exempts*	*Exempts*
Lucille Adels Skalet	$171,089.25		$ 670,376	
Henry Kalman			399,500	
Max Lederman		$ 55.37	41,860	$ 118,800
Elizabeth Klein		510.61	100,917	
Charles Schnall				78,800
Frances Modell		486.38	38,320	39,200
Ralph Lipson		487.75	69 372	
Francine Moss			47 [illegible]0	
Leonard Scheinman		302.67	57,[illegible]00	
Bertha Cannold			15,610	39,500
Anne Berch		5,000.00	61,200	
Walter Feldesman		43,310.61		
Philip Fisher		40,000.00		
Others (17)		38,243.90	507,068	75,550
	$171,089.25	$128,397.29	$2,008,943	$ 351,850

The maturity date as stated in the subordination agreements is as follows: "Maturity is December 31, 1969, and thereafter for successive additional terms of two years unless six months before December 31, in any odd numbered year thereafter, the customer shall give written notice to the firm terminating the agreement as of the succeeding December 31, whereupon it shall terminate on such date". The firm may terminate the agreement at any time by sending a written notice of termination to the lender.

The firm maintains an account for Alma Glickman who has indicated to the firm in a letter dated November 1, 1969, that she is a subordinated lender in the amount of $250,000 of securities. The firm has not received a signed subordination agreement and Mr. Abe Carey, assistant controller, stated that interest on the account has not been

paid for December 1969 nor for January 1970. The Net Capital value of securities in the account at January 30, 1970 was $207,340 which was not included in the previously mentioned capital position.

Also included in the aforementioned capital computation are the following limited partners accounts in accordance with the firm's partnership agreement:

	Ledger		*Long Valuation*		*Short Valuation*
	Debit	*Credit*	*Non-Exempts*	*Exempts*	*Non-Exempt*
Sydelle Meyer ...		$ 68,846.97	$ 328,898		
Diana Fisher		6,247.77	323,752		
Marjorie Alfus ..		6,599.83	255,650		
Philip Fisher		10,000.00	165,000		
Leonard Scheinman		21,526.41	148,757		$9,750
Richard Schneider		3,438.32	124,800		
Arthur Meyer ...		2,802.38	104,506		
Lucille Adels Skalet	$43,516.63		99,750		
Lawrence Blau ..		9,369.75	23,600	$ 79,200	
Joseph Blau		6,905.32	47,120	49,500	
Helen Rothauser		25,000.00		134,640	
Milton Silverman		40,000.00	50,000		
Benjamin I. Schiff		100,000.00			
Murray Lerman ..		75,000.00			
Sidney Tyler		75,000.00			
Henry Kalman ..		100,000.00			
Others (37)		678,578.11			
	$43,516.63	$1,229,314.86	$1,671,833	$263,340	$9,750

Exhibit 3

The following capital is being retired and withdrawn from the firm in the months indicated; the amounts stated are of January 30, 1970 and includes ledger credits plus the Net Capital value of securities.

	Amount	*Month*
General, limited partners and subordinated lenders	$278,111.95	February, 1970
Subordinated lender	28,980.00	March, 1970
Subordinated lenders ...	88,351.00	April, 1970
	$395,442.95	

The following items were effected (additions) in the month of February, 1970.

1. Reduction of investment in the firm's corporate affiliate	$ 200,000
2. General partner's capital	55,000
	$ 255,000

The firm has an operations loss at January 30, 1970 of approximately $485,000. Excluded from the above loss are the following:

1. Partly secured customer accounts	$ 36,784
2. Unsecured accounts	142,087
	$ 178,871
1. Reserve for unsecured—account 469-2	$ 203,047

Exhibit 3

Mr. Robert D. Sadlier stated that he is the general partner primarily responsible for the firm's compliance with Rule 325. Mr. Sadlier also stated that Mr. Novak prepares the monthly capital position and that in Mr. Novak's absence Mr. Carey can also prepare a capital position. The capital computations are reviewed by Mr. Sadlier and they are retained for at least three years.

Review of the capital computation prepared as of December 31, 1969 indicated it was, with exception of certain items, prepared substantially in accordance with the rule. There was a substantial adverse change in the capital ratio of the firm in January 1970 which was due primarily to the retirement and withdrawal of limited partners and subordinated lenders capital of approximately $2,000,000.

A test-check of certain securities, by reference to the stock record, indicated there were twenty-six securities which remained undersegregated, in most cases from January 30, 1970 to February 27, 1970. This was a test period and did not include any test for the period prior to January 30, 1970. A listing of these securities is attached to this report; next to each security are five positions, the first position represents the stock record at January 30, 1970, the second at February 6, the third at February 13, the fourth at February 20 and the fifth at February 27. The schedule indicates that these securities remained undersegregated, in most cases, even after considering fail to receive and firm transfer locations; it appears that, in most cases, the undersegregated securities are being used for bank loan collateral. A listing of the securities was given to Mr. Sadlier.

Review and discussion with Mr. Joel Held, general partner, indicated that the firm is not marking their order tickets as prescribed in Rule 433 relative to "long sales". Relative to over-the-counter securities, Mr. Held stated

that it is the firm's policy to effect a sale only if the customer is long at the time of the sale. Mr. Held stated further that order tickets will be noted in the future as prescribed in the rule.

The firm has been in the process of delivering out their customer accounts. Mr. Sadlier stated that the firm started delivering accounts in June 1969; the special operations questionnaire as of June 30, 1969 showed that the firm sent out 19,544 customer statements. Mr. Sadlier stated that approximately 6,300 customer statements were sent out for the end of February, 1970.

The firm is presently negotiating with Schweickart & Co. and Evans & Co., Inc., with respect to the delivering of approximately 4,000 customer accounts. At the present time, there is no formal agreement with either firm, however, it is expected there will be an agreement with one of the firms mentioned in about two weeks. Thereafter, the firm plans to discontinue retail trades for its customers and trades relative to the above accounts will be on a fully disclosed and introducing basis.

Mr. Sadlier stated that the bulk of the accounts which remain, approximately 2,000, are customer accounts with individual instructions to be delivered to various brokers. Mr. Sadlier estimates that the physical delivery of these accounts should be completed by May, 1970.

Mr. Sadlier stated further that the firm has discontinued clearing trades for their institutional accounts. Trades relative to March 2, 1970 and subsequently thereafter are being introduced to Schweickart & Co., on a fully disclosed and introducing basis. Settlements of the accounts with respect to activity up to March 2, 1970 will be between Hertz, Warner & Co., and the customer. The trial balance

as of March 6, 1970 indicated the following debits and credits with respect to these institutional accounts:

Debits	*Credits*
$ 1,286,117.69	$ 1,093,089.25

Mr. Sadlier stated that the general and limited partners, subordinated and firm accounts will be retained by the firm. The partly secured and unsecured accounts, approximately 165, will probably be retained by the firm.

Mr. Sadlier advised that the firm has no formal internal audit department.

Discussion with certain of the firm's personnel indicated that the fails to deliver and receive detail totals were in agreement with the general ledger accounts at January 30, 1970 and that fail confirmations are sent out monthly; omnibus accounts were curretly reconciled as of February 6, 1970 and that the firm's bank accounts were currently reconciled to January 30, 1970 as of March 4, 1970.

It was noted that the firm maintains several dividend accounts for 1969 and prior years. The dividends which the firm charged at January 30, 1970 were debits of $262,657 and short values of $321,806, credits of $39,034 were included in Aggregate Indebtedness which represents the totals of the various dividend accounts. The firm maintains a dividend 1969 account, #315-1, which had a net debit balance at January 30, 1970 of $229,401 which is included in the above debit total of $262,657. Mr. Sadlier stated that the last time the detail records, for this account, were tied into the general ledger was at July 30, 1969. Mr. Hermes Nazario, who is in charge of the dividend department, stated that the posting of the detail records for this account went to October, 1969 and sporadically thereafter. Mr. Sadlier stated that he presently has two individuals work-

ing on this account to determine what the various receivables are in order that they can be collected as they are established. Relative to dividends applicable to 1970, Mr. Nazario stated that detail records, by security, are being set up so that these records can be tied into the general ledger.

A review of the special operations questionnaire as of January 30, 1970 indicated that responses to certain questions was "not applicable" (response for dividends over 30 days) or "no records maintained". In reviewing the respective questions it was found that the firm has the necessary records in order to answer the respective questions. Mr. Norman F. Carney, general partner, stated that the answers to future operation questionnaires will be prepared by the firm's certified public accountants.

The firm's books and records are produced by Automatic Computer Services, Inc., and were currently posted at March 3, 1970.

The contents of this report were reviewed with Messrs. Carney and Sadlier on March 10, 1970 at which time the following was stated:

1. The firm has no material liabilities, actual, contractual or contingent not recorded on the books of account.

2. There has been no change in the subordinated accounts previously mentioned.

3. The only partner borrowing for capital purposes is Mr. Paul Cohn which borrowing consists of 2,000 shares of American Telephone & Telegraph, due October 31, 1970.

A. J. Iovine
A. J. Iovine—Examiner

R. W. Lee—Examiner

mbt
JB

Plaintiff's Exhibit 4

NEW YORK STOCK EXCHANGE
Department of Member Firms
4 New York Plaza
at Broad and Water Streets
New York, N. Y. 10004

May 11, 1970

Hertz, Warner & Co.
2 Broadway
New York, New York 10004

Attention: Mr. Robert Sadlier

Gentlemen:

Reported under Question 12A of the audited financial questionnaire as of November 2, 1969 were the following subordinated lenders to the corporation:

Berrie Trust
Mr. Burack
Mr. Cunniff
Hertz, Warner & Co. Foundation
Hertz, Warner & Co. Profit Sharing Trust
Mr. Lerman
Mr. B. Schiff
Mr. Tyler
Mr. Yeskel
Mrs. Glickman

Our records indicate that we have not received the required documentation evidencing these loans. Before the proceeds of the above loans can be considered "good capital", the required documentation must first be submitted for our review and approval.

Exhibit 4

Reported under Part III(J)(1) were the following capital borrowings:

Borrower	*Lender*	*Type*
Paul Cohn	Peerless Mills, Inc.	Securities
Ben Kramer	Ruth Kramer	Cash ($25,000)

A review of our files indicates no evidence of these capital borrowings. These "capital" borrowings must be reviewed and approved by the New York Stock Exchange before they can be looked upon as being "good capital".

Additionally, our records indicate the following "capital" borrowing that should have been reported under Part III(I)(1):

Borrower	*Lender*	*Type*
Henry Warner	Ina F. Warner	Securities

Would you please advise us if this borrowing has been repaid or was omitted in error.

According to Part III(B)2, $25,004 was required to properly margin customers' security accounts in accordance with the provisions of Rule 431. Please advise us if we are correct in assuming that calls for this amount have since been issued and met.

Reported under Part II(d) were substantial amounts to be withdrawn within the next six months. Would you please advise us of the steps that you have taken or will be taking to replace this capital.

The $55,000 reported under Question 14c evidencing an agreement to pay a retired general partner was charged to net capital in our analysis.

The information supplied under Question 6G reflected fully paid securities not segregated in the aggregate of

Exhibit 4

$27,382,321. Please advise us if these securities were segregated or properly disposed of subsequent to the audit date.

Of this above total, we note that securities amounting to $16,912,610 were in the following locations:

Box	$ 8,683,377
Stock loan	1,208,850
Bank loan	7,020,383
	$16,912,610

In this regard, we would appreciate your advising us of the length of time these securities remained unsegregated, the circumstances attributed to these conditions, the number of items in each location, and the steps taken to prevent recurrences

The following items reported under Question 6C "customers party secured accounts" were handled as follows:

1. The ledger debit of $240,944 and short values of $63,841 were charged to net capital in our analysis.

2. The ledger credit of $13,136 and long values of $207,877 were allowed in our analysis.

The ledger debit of $1,247,018 reported under Question 11(B)3 evidencing undistributed profit and loss account was charged to net capital in our analysis.

The following items reported under *Question 13* were handled as follows:

(b) The ledger of $679 and short values of $13,760 evidencing insurance claims in transit were charged to net capital.

Exhibit 4

(d) The $2,000,000 ledger debit in your corporate affiliate was charged to net capital.

(g) The $18,300 debit evidencing "accrued interest receivable—customers debit balances" was charged to net capital.

(k) The ledger debit of $312,957 and short values of $360,065 evidencing "dividends receivable" were charged to net capital, additionally no value was allowed for longs of $455,942. In future responses, please carefully identify items that are "within 30 days."

(l) Short values of $28,649 representing "dividends payable" were charged to net capital and "no value" was given for longs of $130,125.

(m) "Mergers and exchange accounts effecting arbitrages of customers' securities"—

1. The ledger debit of $53,794 and short values of $137,269 were charged to net capital.

2. The ledger credit of $8,876 was included in aggregate indebtedness and "no value" was allowed for longs of $212,039.

Additionally, would you advise us of the nature of these items and if they have since been consummated.

(n) The ledger debit of $15,666 and short values of $78,512 evidencing "dividends receivable and payable—regional exchanges" were charged to net capital in our analysis—as a point of information the ledger credit of $61 was included in aggregate

indebtedness and "no value" was allowed for longs of $33,089.

(s) Short security differences of $201,829 were reported. Would you please advise us of the progress that you have made in resolving these differences.

If you have any questions, please do not hesitate to contact us.

Very truly yours,

David O'Connell
DAVID O'CONNELL
Finance Specialist

Plaintiff's Exhibit 6

AMERICAN TELEPHONE & TELEGRAPH COMPANY
195 Broadway
New York, N. Y. 10007
Phone (212) 393-2151

TREASURY DEPARTMENT
STOCK AND BOND DIVISION

December 17, 1970

Mr. A. C. Fine, President
Peerless Mills Co., Inc.
5750 Collins Avenue
Miami Beach, Florida 33141

Dear Mr. Fine:

Mr. Paul Cohn has asked me to write to you in order to keep you advised of our investigation of the transfer of a 2000 share certificate registered in the name of Peerless Mills, Inc.

On December 9 and December 15, Mr. Cohn and I discussed this matter over the telephone. In the meantime, our Legal Department has given a preliminary review of the case, and they have said that a mistake was made in processing this transfer.

I am now in the process of contacting Hertz, Warner & Co. to ascertain their position on this matter. We are also further investigating the transfer itself here in our office.

Mr. Cohn is to call me on Friday, December 18, and in any event, I will continue to keep you informed as to the action being taken. If you wish to write, or to call me collect, please do so at Area Code 212-393-2780.

Exhibit 6

Thank you in advance for your continued patience.

Yours very truly,

Janet L. Clundt
(Miss) Janet L. Clundt
Correspondent

JLC/jc
c.c.: Mr. Paul Cohn
160 East 65th Street, Apt. 12-C
New York, N. Y. 10021

Plaintiff's Exhibit 8

HERTZ, WARNER & CO.
Members New York Stock Exchange
Two Broadway
New York, N. Y. 10004
(212) 425-8000

November 21, 1969

Dear Partner:

Enclosed please find a copy of the new Partnership Agreement for which we require your signature in the appropriate space provided therein. Upon execution, please return the agreement in the self-addressed envelope provided.

After this office receives your signed copy, I will make arrangements to have a fully executed copy reprinted and sent to you for your files.

Your prompt response to this request would be most appreciated. Trusting this letter finds you in good health, I remain

Very truly yours,

Joel Held
JOEL HELD
General Counsel

JH:mif
Encs.

Plaintiff's Exhibit 9

NEW YORK STOCK EXCHANGE
Department of Member Firms
4 New York Plaza
at Broad and Water Streets
New York, N. Y. 10004

Division of Documents

February 20, 1970

Hertz, Warner & Co.
2 Broadway
New York, New York 10004

Attention: Mr. Joel Held

Gentlemen:

Referring to our letter of December 18, 1969, we are wondering if you are able to furnish us with an executed copy of your Amended Articles of Limited Partnership as of July 1, 1969. We would appreciate your cooperation in this matter.

Very truly yours,

Division of Documents

By John H. Mittler, Jr.
JOHN H. MITTLER, JR.

Plaintiff's Exhibit 10

NEW YORK STOCK EXCHANGE
Department of Member Firms
4 New York Plaza
at Broad and Water Streets
New York, N. Y. 10004

Division of Documents

April 23, 1970

Hertz, Warner & Co.
Two Broadway
New York, New York, 10004

Attention: Mr. Joel Held

Gentlemen:

Referring to our letter of December 18, 1969 and February 20, 1970 we are wondering if you are now in a position to furnish us with an executed copy of your amended articles of Limited Partnership as of July 1, 1969.

We would appreciate your cooperation in this matter.

Very truly yours,

Division of Documents

By John H. Mittler, Jr.
JOHN H. MITTLER, JR.

Plaintiff's Exhibit 11

July 8, 1970

Mr. John H. Mittler, Jr.
New York Stock Exchange
4 New York Plaza
New York, New York 10004

Re: Hertz, Warner & Co. Partnership Agreement

Dear Mr. Mittler:

As per your request enclosed please find photostats of the various signature pages for the Hertz, Warner & Co. 1969 Partnership Agreement. As you will note, not all partners have signed the agreement and this has been the cause for the delay in forwarding to you an executed copy of the agreement.

If you have any further questions, please do not hesitate to call.

Very truly yours,

Joel Held
JOEL HELD

JH:mic
Enc.

Plaintiff's Exhibit 12

HERTZ, WARNER & Co.
Members New York Stock Exchange
Two Broadway, New York, N. Y. • (212) 425-8000

May 28, 1970
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Henry Warner
39 Fairfield Terrace
Short Hills, New Jersey

Dear Henry:

As discussed in our meeting of April 30, 1970 and again on May 4, 1970, I bring your attention to the delivering out of your capital account of 2,000 shares of Republic National Bank of New York Common Stock, which was delivered to the Security National Bank in Newark, New Jersey on April 13, 1970 "free", pursuant to your instructions.

Again bringing your attention to our discussion on May 5, 1970, I will take this opportunity to remind you that at that time you promised to deliver to Irving Hertz as well as the undersigned a full written explanation as to the reasons, purposes and motives behind the removal of the above-mentioned securities from your capital account. To date I have received no such answer nor am I aware of any circumstances that would justify your actions in removing the securities from your account.

In view of the above, as counsel for the firm, I hereby make demand upon you for the delivering back to Hertz, Warner & Co. of the above-mentioned 2,000 shares of Republic National Bank of New York or the market value thereof as of April 13, 1970.

Exhibit 12

I can only state that your actions in this matter have left grave doubts in the minds of the partners of this firm. Therefore, if the above-mentioned securities or the market value thereof, (as of April 13, 1970) are not returned to your capital account immediately, I fear that the consequences may be of severe proportions.

Very truly yours,

Joel Held
JOEL HELD
General Counsel

JH:mif

Plaintiff's Exhibit 14

LIPKIN, GUSRAE & HELD
Attorneys at Law
225 Broadway
New York, N. Y. 10007

September 15, 1970

American Telephone and Telegraph Co.
195 Broadway
New York, New York

Attn: Stock Transfer Department
Re: Certificate No. 2000/0471-0429

Gentlemen:

Enclosed pleased find a letter of correction issued by our client, Hertz, Warner & Co., relating to the above mentioned stock certificate.

As per enclosed letter, our client wishes the stock certificate in question (0471-0429) to be cancelled and a new certificate in the amount of 2,000 shares of the common stock of American Telephone and Telegraph Company to be issued in the name of Hertz, Warner & Co. As explained in the enclosed letter of correction, Hertz, Warner & Co. in error request a transfer of 2,000 shares into the name of Peerless Mills, Inc. and, hence, the issuance of the attached 2,000 shares certificate.

Our client has requested that you issue the new 2,000 shares certificate in their name and send it to this office at the above mentioned address.

Very truly yours,

Joel Held
JOEL HELD

jh/jr
Encl.

Plaintiff's Exhibit 15

LIPKIN, GUSRAE & HELD
Attorneys at Law
225 Broadway
New York, N. Y. 10007

September 15, 1970

American Telephone and Telegraph Co.
195 Broadway
New York, New York

Gentlemen:

On September 15, 1970, this office, on behalf of our client, Hertz, Warner & Co., delivered to your offices a 2,000 shares certificate of the common stock of American Telephone and Telegraph Company so that said certificate could be transferred pursuant to a letter of correction into the name of Hertz, Warner & Co. Certificate surrendered for transfer was No. 2000/0471-0429/N/O/Peerless Mills, Inc.

Because of internal auditing procedures and New York Stock Exchange requirements, our client is requesting that you supply this office with all information pertaining to the above mentioned stock certificate. For your information, the following is a brief explanation of the facts surrounding the transfer together with more specific requests for information:

On or about October 15, 1969, the original 2,000 shares of American Telephone and Telegraph Company registered in the name of Peerless Mills, Inc. was submitted to your office for transfer. The securities were returned due to insufficient documentation relating to their transfer. New documents were supplied i.e. Corporate Resolution, Power of Attorney and stock power and the 2,000 shares in the name of Peerless Mills, Inc. was cancelled and a new 2,000 shares certificate in the name of Hertz, Warner & Co. was issued. This issuance took place approximately December,

Exhibit 15

1969. Our client is in great need of copies of the various documentation which accompanied the original stock certificate of Peerless Mills, Inc., which was eventually cancelled and reissued into the name of Hertz, Warner & Co.

Subsequent to the above mentioned transaction, the 2,000 shares certificate in the name of Hertz, Warner & Co. was delivered to your offices with instructions to transfer it back into the name of Peerless Mills, Inc. The Hertz, Warner & Co. certificate was cancelled and on May 1, 1970, certificate #0471-0429 for 2,000 shares was issued in the name of Peerless Mills, Inc. It is extremely important that our client obtain the actual transfer instructions requesting the certificate to be transferred from the name of Hertz, Warner & Co. into the name of Peerless Mills, Inc.

In view of the nature and complexity of the situation surrounding the above mentioned 2,000 shares of stock, it is of the utmost urgency that our client obtain the requested documents as soon as possible.

Your immediate attention to this request and your anticipated cooperation is greatly appreciated.

Very truly yours,

Joel Held
JOEL HELD

jh/jr
LIPKIN, GUSRAE & HELD
225 Broadway
New York, N. Y. 10007

American Telephone & Telegraph Company
195 Broadway
New York, New York

Attn: Stock Transfer Department
Mrs. Zajkowski

Plaintiff's Exhibit 19

Re: HERTZ, WARNER & CO.

DRAFT PARTNERSHIP AGREEMENT—SUGGESTED CHANGES

PAGE 7

(a) Change introductory language of Article Fourth to read:

"As of the effective date of this Agreement, the Partners shall contribute to the Capital of the Firm, in either cash or marketable securities approved by the Executive Committee, and valued (except where specific securities are stated) as their closing market prices on June 30, 1969, the following:"

(b) Change entry re Mr. Joseph Blau to read:

"J. Blau $210,000 in U. S. Govt. Bonds which are not subject to any deductions under New York Stock Exchange Rule 325"

(c) We suggest that the list of Limited Partners be alphabetized.

PAGE 9

Substitute for first paragraph:

In the event of the liquidation of any of the securities contributed by any Limited or General Partner, the cash resulting from such liquidation, up to the amount of such Partner's capital contribution, shall be retained as the capital contribution of such partner, and the excess, if any, shall be credited to the partner's customer account with the firm.

Any partner shall have the right to acquire new securities with any cash balance in his partnership account resulting from a liquidation of securities.

Exhibit 19

PAGE 10

(a) Delete last three sentences of the carryover paragraph, and substitute:

"The market value of the securities contributed to capital by each member of the Executive Committee and each other General Partner shall be computed monthly as at the last day of any such month and if such market value is less than ninety percent of the stated capital contribution set opposite his name above, he shall, by the 15th day of the following month, contribute to the firm such additional securities as, valued at market value as at the last day of such preceeding month, is sufficient to bring the market value of the securities contributed by him up to the amount of his stated capital contribution. The Executive Committee may waive the requirement that any General Partner other than a member of the Executive Committee make additional contributions by reason of the diminution in the market value of the securities contributed by him. Any such waiver may be revoked and discontinued at any time by the Executive Committee.

If any member of the Executive Committee shall fail to make any additional contribution required of him hereby, his percentage participation in the profits of the partnership shall be proportionately reduced during the period such failure shall continue and this remedy shall be in addition to all other remedies the partnership may have.

In the event of any such failure by a member of the Executive Committee and the continuance of such failure for ten days after the date on which his additional contribution was due, the firm shall give written notice of such failure to each General and Limited Partner.

No Limited Partner shall be required to make any additional contributions to the capital of the Firm by

reason of any dimunition in the value of the securities contributed by him to the firm.

If the securities contributed by a partner have a value in excess of his specified capital contribution, such partner shall have the right to withdraw such excess."

PAGE 11

Substitute for last full paragraph:

The Limited Partners listed above shall be charged with the percentages set opposite their respective names above of any losses sustained by the Firm for transactions effected or events occurring since July 1, 1969 (except losses arising from changes in values of securities contributed, and changes in memberships, referred to above), but only to the extent of the balance of the capital account of such Limited Partner at the time of such charge. In no event shall any such Limited Partner be obligated to contribute any additional capital to the firm, or be liable or charged for any of the firm's obligations except to the extent of the remaining balance of his capital contribution. It is expressly understood that said Limited Partners shall not be charged with any part of any loss arising out of any event occurring prior to July 1, 1969, including losses resulting from the determination after such date of litigation relating to transactions prior to such date.

The General Partners agree that (a) all profits arising from any sales of a seat occurring on or prior to

shall belong to and be the property of the Partnership and no part of any such profit shall be credited to the account of any specific partner, and (b) in the event that any membership is sold after such date and during any fiscal year at a profit, the profit shall remain in the firm as an asset of the firm (and not be credited to the

capital account of any General Partner) until the close of such fiscal year. If the results of operations for such year, apart from the profit arising from such sales, are profitable, the profits on the sale of such membership shall be credited as set forth subsequently herein. If the results of operations for such year, apart from the profit arising from the sale of the membership, are a loss an amount equal to such loss shall be set aside out of the profit arising from the sale of memberships and shall be deemed contributed to the firm and shall not be credited to the capital account of any partner, and the remainder of such profit, if any, shall be credited as hereafter set forth. This provision shall supersede any inconsistent provisions contained in this agreement.

PAGE 13

(a) Change (b) to:

In the event that the capital account of any one or more of J. Blau, A. Meyer and B. Schiff, Limited Partners, is exhausted by reason of the charging of losses against such account, then the losses which would have been borne by such Limited Partner but for the exhaustion of his capital account shall be borne by the General Partners proportionately in relation to their participation in the profits of the partnership.

(b) Insert "general" before "partner" in second line of paragraph (d).

PAGE 19

(a) Change paragraph Eighth (b) to read as follows:

"(b) Upon the effective date of the retirement of a Limited Partner, as specified in paragraph Eighth (a)

herein, such retired Limited Partner shall be entitled to have returned to him his capital contribution as then constituted, in cash to the extent that the same consists of cash, and in securities as previously contributed by him, to the extent that the same consists of securities.

(b) Change paragraphs Eighth (c), Eighth (d) and Eighth (e) to read as follows:

(c) Any General Partner of the firm other than a member of the Executive Committee, may retire at any time by giving ninety days written notice to the Executive Committee of his intention to retire, which notice shall be mailed to the members of the Executive Committee of the firm at the address given above, and the retirement of said General Partner shall be effective ninety days after the mailing of such notice, or on the last day of the fiscal quarter in which such notice is given whichever is later. In the event that any General Partner, other than a member of the Executive Committee, retires from the firm, the name and goodwill of the firm shall have no value in computing his distributive shares of the assets of the firm.

(d) In the event of the retirement of any General Partner, other than a member of the Executive Committee, (for the purposes of this Agreement the adjudication in bankruptcy of any partner or expulsion of any partner from membership in any Exchange, shall be treated the same as if such partner had retired as of date of adjudication or expulsion) such General Partner's interest in the net profits of the Partnership shall terminate on the date of his or her retirement and his or her capital contribution shall be returned to him or to her on said date, less his or her share of the losses, if any, chargeable to

such General Partner. The remainder of such partner's distributive share of the net assets including his or her share of the net profits shall be paid to such partner not more than ninety (90) days from the date of such retirement. In the event of the retirement of a partner who has contributed securities as all or part of his capital contribution, such partner shall have the right to demand and receive, by not later than ninety days after the date of such retirement, on account for the return of his capital contribution, securities of issues which such partner contributed to the capital of the Partnership.

(e) In the event of the retirement of any General Partner other than a member of the Executive Committee or Limited Partner hereto, prior to the execution of a new partnership agreement, the Executive Committee of the firm, or any member of the firm designated by the Executive Committee, shall have the full power and authority to sign for said retiring partner, a new partnership agreement or amendment thereto, which agreement or amendment notes the retirement of said partner.

(f) If any member of the Executive Committee shall die, or be adjudicated incompetent, or shall give written notice of his intention to retire from the Firm, the Firm shall notify each of the General Partners and Limited Partners in writing of the occurrence of such event. Upon any such occurrence, the Partnership shall terminate as of the end of the month next succeeding sixty days after such occurrence and the provisions of Article Sixteenth shall be operative.

Exhibit 19

PAGE 20

Change introduction to paragraph Ninth to read:

"In the event of the death or adjudication of incompetency of any General Partner other than a member of the Executive Committee or any Limited Partner during the partnership term . . ."

PAGE 21

Paragraph Eleventh (c):

Correct the designation of members of the Executive Committee to reflect Mr. Saluc's withdrawal.

PAGE 23

Rewrite first full paragraph to read as follows:

"The Partners shall be privileged at any time to withdraw in whole or in part cash or securities in their account which are in excess of their agreed capital contributions hereinbefore set forth or to substitute cash for securities, securities for cash or securities for other securities, provided that all substitutions shall be for cash or securities of equal value as at the time of such substitution, and that in the case of substitution of securities the new securities shall be approved by the Executive Committee.

Paragraph Fifteenth (a)—delete reference to Mr. Saluc.

PAGE 24

Paragraph Fifteenth (c)—should the number of members of the Committee required to act be changed in view of the withdrawal of Mr. Saluc?

Paragraph Sixteenth—add the following:

"Upon any distribution of the assets of the Partnership resulting from a termination, liquidation, winding up or like event, there shall be returned to the Limited Partners

Exhibit 19

their respective capital contributions (less, in the case of Blau, Meyer and Schiff, any losses charged against such contributions hereunder), before any assets are distributed to the General Partners. In the event that the assets available for distribution to the Partners are less than the aggregate balances in the Limited Partners' capital accounts, such assets shall be distributed pro rata among the Limited Partners in proportion to the balance in their accounts.

PAGE 25

Add to paragraph Seventeenth:

"Provided however, that in the event of the receipt of notice of withdrawal of a member of the Executive Committee, the Firm shall give notice thereof in writing to each General and Limited Partner as provided in paragraph Eighth (f).

PAGES 26 AND 27

Shouldn't these schedules correspond with the percentages on pages 11 to 13?

Plaintiff's Exhibit 20

PEERLESS v. AT&T

Pages to be read into evidence from deposition of Irving E. Hertz taken on November 1, 1971 and August 8, 1973:

3– 5
6– 8
17– 19
22– 23
29– 38
46– 54
56– 58
60– 67
69–
76– 77
116–119
123–127
144–146
151–152
155–159
164–166

• • •

IRVING E. HERTZ, having been first duly sworn, was examined and testified as follows:

Examination by Mr. Genovese:

Q. Mr. Hertz, would you please give us your full name and address. A. Irving E. Hertz, 985 Fifth Avenue, New York City.

Exhibit 20

Q. Would you briefly describe to me your educational background? A. Roughly three years of high school.

Q. How old are you, Mr. Hertz? A. 49.

Q. After leaving high school, what was your first business experience? A. I was in the music business for about two years.

(4) Q. After that? A. I was in the Marine Corps for about four years.

Q. After leaving the Marine Corps, where did you go? A. I went to work for Ronson Corporation in 1946 for approximately 16 years.

Q. That brings us to approximately 1962, 1963, is that right? A. No, it should bring you to approximately 1960. I left Ronson in approximately March of 1960.

Q. Where did you go from there? A. My own business for about nine months.

Q. What type of business was that? A. Manufacturer's rep.

Q. After leaving that business where did you go? A. I bought a seat on the New York Stock Exchange on December 15, 1960, formed a new company by the name of Lieberbaum & Company, members of the New York Stock Exchange, January 1, 1961.

Q. How long did you stay with that company? A. I believe until August of 1963.

(5) Q. What did you you do at that time? A. Primarily I was one of the managing partners of the firm and a seat holder of the firm during the period I was with Lieberbaum.

I left there in August of 1963 and formed Hertz, Neumark & Warner, organized it and started in business on October 8, 1963.

Exhibit 20

Q. For how long did you remain with that firm? A. Well, I guess technically I'm still with it, part of it. We are still liquidating the firm. So I guess technically I might be still construed as being either a consultant as of this moment for the balance of the liquidation, but I remained—I think we went into liquidation of the firm as of May 1970, I believe. That's when we closed our doors for operation.

Q. Do you have any other employment at the present time? A. Actually, I just joined D. H. Blair and will be employed by D. H. Blair upon my return.

Q. In what capacity? A. Employee.

Q. Any particular phase of the business (6) that you will be concentrating in? A. Primarily investment banking.

Q. When did the firm of Hertz, Neumark & Warner cease to be known by that name and be known by the name of Hertz, Warner? A. Upon the resignation or the termination really of Ronald Neumark. I can't give the exact date, but I would estimate that it was probably sometime in 1968, but it is a matter of record of the Exchange.

Q. You were a founding partner of Hertz, Neumark & Warner? A. Yes.

Q. Throughout the existence of the firm, what was your principal function within the firm? A. One of the managing partners of the firm, primarily interested in the deal area of our business, underwriting syndications, and the—generally the overseer of the business, per se.

Q. Who were the other managing partners? A. Well, it is a little ambiguous to ask that.

During the last three years we had an executive committee that consisted of Mr. Jay Saluc, (7) Norman Carney, Henry Warner and myself. Mr. Saluc was terminated as

of I believe December of 1969 and the remaining three partners, Carney, Hertz and Warner were the remaining executive committee of the firm.

Q. Did there come a time, a point in time, when the executive committee ceased to exist? A. No. There came a point in time when certain partners of the executive committee ceased to exist, which left me, so I was a self-appointed remaining executive committee.

Q. When did Mr. Carney cease to exist? A. I believe in May or June of 1970.

Q. How about Henry Warner? A. I believe May of 1970.

Q. So you were the sole surviving partner, so to speak, is that right? A. Yes. Well, I was the sole surviving partner of the executive committee, but we did have two other partners that remained on with the firm.

Q. Who were they? A. Cohn and Sadlier.

Q. Is Mr. Sadlier still employed or is he still a partner of Hertz, Warner? (8) A. Yes.

Q. Is he still a partner? A. Yes.

Q. What is his present function? A. Mr. Sadlier was in charge of the back office of Hertz, Warner & Company and still is.

Q. Am I correct in understanding that the sole function of Hertz, Warner now is to liquidate its assets; is that correct? A. Yes.

Q. Do you have any projections as to when this will be completed? A. I don't know, frankly. It could be six months, it could be a year. I would say—I'm hopeful that it will be on or before December 1972.

Q. Would you tell me basically what goes on now at Hertz, Warner on a day-to-day basis in the process of its liquidation? A. Primarily the function that they have

right now is collection of what we might term as accounts receivable and paying that what we term as accounts payable. All customers' securities have been delivered out. We have no customers remaining

* * *

Q. Did there come a time, Mr. Hertz, in 1969 when a decision was made by the executive committee of Hertz, Warner to offer a partnership to Mr. Cohn? A. No, it wasn't exactly the way it came about.

Every year we had an amendment to the previous year. We had a continuation of our partnership. We had various limiteds and generals either leaving or new ones coming in.

Those people that we considered partnership caliber we gave consideration to, and I believe Mr. Warner had discussed with me the possibility of Mr. Cohn becoming a partner with other various partners who were then not partners.

I presume that these discussions took place with Mr. Cohn directly with Mr. Warner.

Q. Are you testifying that you were not active in the decision to offer him a partnership? (18) A. Yes, I was active in the decision based on the executive committee meeting concerning the admission of new partners, yes.

Q. Of— A. After the recommendation of one of our existing executive committee members.

Q. The executive committee had a meeting time and decided who would be offered a partnership?

Mr. Straub: I object to the form of the question and direct the witness not to answer.

Exhibit 20

Q. Did the executive committee have a meeting at which time it was decided to whom partnership would be offered? A. I believe so, yes.

Q. Can you tell me approximately when that meeting was? A. Probably early in—maybe the third or fourth month in 1969.

Q. Did you have any discussions directly with Paul Cohn concerning the offer that was made to him to become a partner in Hertz, Warner?

Mr. Straub: I object to the form of that question and direct the witness not to answer.

Q. Did there come a time when Hertz, (19) Warner & Company made an offer to Paul Cohn to become a partner in the firm? A. Will you repeat the question, please.

(Question read.)

A. It is a little ambiguous, but I will answer yes as to the question because Mr. Cohn had been seeking readmission to the firm as a partner, and because of the job that he was doing we considered quite seriously to allow him this allied membership.

Q. Did he make any requests of you for readmission? A. Yes, many times.

Q. When did the first such request occur? A. I think that—I couldn't give you the exact date, but I think once Paul assumed his new responsibility as syndicate manager, and I don't know the exact date of that, he felt that he was now qualified. He wanted his partnership back, but I don't remember the date.

Q. Do you recall when he became syndicate manager? **A. No.**

Exhibit 20

Q. Not even the year? A. It was either the early part of 1969

* * *

Q. Do you recall anything else about the terms of the offer that was made to him? A. I was also led to believe that Paul Cohn was willing to put up $100,000 in some form.

Q. Did you have any information as to where that $100,000 figure was coming from? A. Yes, I did.

Q. What was your information? A. Well, Paul Cohn told me that since he got married the availability of money to him was from his father-in-law and mother-in-law.

Q. You knew that before the offer was made to him, is that correct?

Mr. Straub: I object to the form of that question and direct the witness not to answer.

Q. Paul Cohn made this statement to you, did he not, before he was approached by Mr. Warner to become a partner?

(23) Mr. Straub: I object to the form of the question and direct the witness not to answer.

Q. Paul Cohn told you this before Mr. Warner discussed with him the terms of the partnership offer, is that correct? A. Told me what?

Q. Told you his source for the funds— A. Yes, I so stated that.

Q. I am trying to get it in point of time, Mr. Hertz. A. I don't know the time. If you want me to elaborate on it, he told me many things concerning his marriage which dealt with his personal finances.

Exhibit 20

Q. Do you know a man by the name of Conrad Schmidt? A. Yes.

Q. Who is he? A. He was an employee of our firm.

Q. In what capacity? A. Primarily in investment banking.

Q. Was there a meeting of partners which took place in or about December of 1969? A. I am sure there was.

Q. Let me ask this question, Mr. Hertz:

* * *

Q. Did you have any discussions with anyone about that, the sum of his capital contribution? A. Only what I was told, that he was willing to make a hundred thousand capital contribution.

Q. Mr. Hertz, did you sign a partnership agreement of Hertz, Warner & Company dated July 1, 1969? A. I believe I did.

Q. Do you recall when you signed it? A. No, but it was sometime between July 1 of 1969 and December of 1969, somewhere in there.

Q. Do you have the original of that agreement? A. Do I, personally?

Q. Yes. A. No.

(30) Q. Do you know who has it? A. I believe our attorney, who was then partner of the firm, Mr. Joel Held, would have the documents.

Q. Do you have a copy of it? A. I don't believe I have a copy.

Q. Do your attorneys have a copy? A. Yes.

Mr. Genovese: Mr. Straub, would you produce it, please?

(Handing)

Exhibit 20

Q. Mr. Hertz, I show you a document entitled, "Amended articles of limited partnership of Hertz, Warner & Co.," made as of the first day of July 1969, and ask you if this is a copy of the agreement that you signed (handing). A. (Examining) It appears so. Yes.

Q. Referring you to page 28 of the agreement—

Mr. Straub: You will have this marked at some point.

Mr. Genovese: I will have it marked.

Q. —under the heading, "General partners," could you tell me which of the persons designated (31) therein signed the agreement? A. I would venture to say everybody but possibly one.

Q. Which one? A. I'm guessing now. It might have been Kenneth Sheldon because we were releasing him of his duties. He was one of our floor partners. We had two members on the floor of the New York Stock Exchange. Again, it's a matter of record.

Q. Would you now look at the limited partners on page 29 and tell me who signed among the limited partners there listed, if you recall? A. There were I believe four or five partners, limited, who did not sign this agreement. Again, it's a matter of record.

Q. What record are you referring to? A. The record that is on file with our attorney as the documents from the various limiteds, those that signed and those that didn't.

Q. Mr. Held? A. Yes. He would have a copy, and I believe possibly Willkie, Farr may have a copy.

Mr. Genovese: Do you have a copy, Mr. Straub?

(32) Mr. Straub: Not with me.

Exhibit 20

Mr. Genovese: You do have a conformed copy of who signed and who didn't sign?

Mr. Straub: I really can't give you a specific answer to that. I just don't know at this point.

Mr. Genovese: I would request that if you do have such a copy, it be produced.

Q. To your recollection, Mr. Hertz, did Mr. Blau sign this agreement? A. No.

Q. Mr. Meyer? A. No.

Q. How about Mr. Kalman? A. I'm not sure.

Mr. Genovese: Would you mark it for identification, the document entitled, "Amended articles of limited partnership of Hertz, Warner & Co.," made as of the first day of July, 1968, consisting of 33 pages.

(Copy of document entitled "Amended Articles of Limited Partnership of Hertz, Warner & Co." above referred to, marked Plaintiff's Exhibit 31 for identification.)

(33) Q. Mr. Hertz, did there come a time when you received a communication from Mr. Meyer relating to his status as a partner of Hertz, Warner & Company? A. I believe I did.

Q. Could you tell me the substance of that communication? A. Well, there was several. I'm not sure which you are referring to.

Q. Was it oral or in writing? A. A combination of both.

Q. What was the first such communication? A. We had an oral arrangement, Mr. Meyer and Mr. Blau, which related to that which is shown in the partnership agreement,

whereby Mr. Blau and Mr. Meyer and the rest of the senior general partners were to put up capital equal to $50,000 per point, which was agreed upon by Mr. Meyer and Mr. Blau, approved by the executive committee, and also passed on to the other general partners of the firm. That was the first discussion I had had with them.

Q. Who was present at that discussion? A. Mr. Meyer, Mr. Blau and also another gentleman there by the name of Ben Schiff, and the (34) meeting was held at the offices of Hertz, Warner Affiliated Corporation, Pan Am Building, of which I had discussions with the three of them, and we concluded an arrangement so described in the partnership agreement, which I recommended to the executive commitee and so disclosed to the other members of the firm.

Q. Was this meeting prior to July 1, 1969? A. I'm not sure.

Q. Could it have been after July 1, 1969? A. It's possible, yes.

Q. When was the next such meeting that you had with him? A. Concerning what?

Q. The same subject, their participation as partners in Hertz, Warner. A. Well, there really wasn't any meeting. We had prepared a partnership agreement to coincide with the agreement, which is the amendment that you have in front of you.

Q. Plaintiff's Exhibit 31? A. Yes.

Q. Did they have any further communications with them with respect to Plaintiff's Exhibit 31? (35) A. Yes, there were several changes that had to be taken place because of error or omissions of the original amendment which Joel Held brought up—drew up, rather, which didn't cover everything that we had discussed, and we finally amended or changed, rather, that which was the end result of all the changes that took place.

Exhibit 20

Q. Plaintiff's Exhibit 31 is the end result? A. Yes.

Q. Did you have any further conversations or discussions with Messrs. Meyer and Blau— A. Yes.

Q. —concerning Plaintiff's Exhibit 31? A. Yes. They had advised me that we had sent out the amendment to them to sign, and for whatever reason they had at the time, they did not return it signed.

Mr. Meyer then was going to, I think, Switzerland on vacation in January, and I advised Mr. Meyer and Mr. Blau that we had to have these back because of the exchange rules and regulations, and he so advised me that he would sign them (36) and his girl would send it down to me.

Q. Did you receive it? A. No.

Q. Did you have any further conversation with either of them with respect to— A. Yes, many.

Q. What was the next such conversation? A. The purpose and the reason that he didn't sign the agreement.

Q. What did they tell you? A. They wanted certain changes in this which we did not agree to, nor would I do.

Q. What were the changes that they wanted? A. I believe—I really don't know them all, but they had prepared a document which their attorneys prepared covering these various changes. I think that's also a matter of record.

Q. Do you have a copy of that document? A. I believe Mr. Lewis of Willkie, Farr has a copy of that.

Mr. Genovese: Mr. Straub, will you please produce a copy of that document?

Mr. Straub: I will take that one under consideration.

Exhibit 20

(37) Q. Did any of the changes they requested relate to the amount of their capital contribution? A. No.

Q. What did they relate to? A. I just got through telling you. I prefer you read the document.

Q. Unfortunately I don't have the document. I would prefer to read it, too, Mr. Hertz. Right now I would like to get your recollection of it.

Mr. Straub: If you recall.

A. Basically it was concerning capital contributions of general partners and limited partners other than—I'm sorry. It concerned the capital contributions of general partners whereby in the event the capital contribution of the general partner was reduced or depreciated because of market depreciation, the general partners would have to make up that deficiency within 30 days, and any limited partner whose capital was deficient because of depreciation of securities would not have to make it up. I would not agree to that.

Q. When do you place the last of these (38) discussions? A. I would say we have had discussions like this all through—up until the time we settled with all of the subordinated lenders and limiteds and general partners of the firm, which was sometime in '71.

Q. You say you settled with all of the subordinated, general and limited partners? A. No, all the limiteds—we settled with all the limiteds and the subordinates with the possible exception of two limited partners. We exchanged releases. We did not settle with the generals.

Q. What were the terms of that settlement? A. That's a volume, basically the terms of the settlement, we paid out the subordinated lenders 100 cents on the dollar, and the

limiteds agreed to waive any liability that the general partners might have to the limited partners for the limited money that they lost in the firm.

Q. Did the limited partners receive any money? A. In a few exceptions, yes.

* * *

(46) Q. Are you sure of that? A. I am positive.

Q. Mr. Hertz, was all of your capital contributed pursuant to the agreement which was marked as Plaintiff's Exhibit 31? A. Yes.

Q. Was any of your capital borrowed? A. Yes.

Q. From whom? A. My wife.

Q. How much of it? A. Maybe a couple of hundred thousand dollars.

Q. Did your wife have any interest in Hertz, Warner & Company other than as a lender of capital to you? A. No.

Q. Mr. Hertz, who is Marvin Furst? A. He is an accountant and our outside auditor.

Q. Was it his practice to attend partnership meetings of Hertz, Warner? (47) A. No.

Q. Do you recall any partnership meetings at which he was present? A. There were some. I don't recall. I just don't know which ones, but there were some.

Q. Do you recall him being present at a partnership meeting in or about December 1968? A. No. December what?

Q. 1969. A. No.

Q. Did Mr. Furst prepare monthly financial statements for Hertz, Warner? A. Yes, for several years, and the last, I guess, year, year and a half, we did this by internal controls.

Q. When you say "the last year, year and a half," what period are you referring to specifically? A. The last year,

year and a half of our business, which was prior to May 1—May 1970, possibly a year before that.

Q. Who was the person in internal controls responsible for this? A. We had a comptroller and our back office room partner.

(48) Q. Did you receive copies of these statements regularly? A. Yes.

Q. Were they prepared only on a monthly basis or were they prepared even more frequently? A. No, monthly.

Q. Pardon? A. Monthly.

Q. To whom were they distributed? A. Primarily to the executive committee as distribution and anyone else that requested a copy.

Q. Prior to the year or so prior to May 1, 1970, did you receive these statements directly from the outside accountant, Mr. Furst? A. No, I received them monthly up until the last year of our operation, where I then received them from internal controls.

Q. Throughout the operation you received them monthly, just a difference of where they came from? A. Yes.

Q. Is that correct? A. Yes.

Q. Do you have copies of any of those statements (49) with you? A. No.

Mr. Genovese: Do you, Mr. Straub?

Mr. Straub: No.

Q. Did there come a time in the fall of 1969, Mr. Hertz, when the younger partners in the firm requested of you that they receive copies of monthly financial statements? A. Not that I am aware of.

Q. Was a request ever made on behalf of the younger partners of the firm for representation on the executive committee? A. Yes.

Exhibit 20

Q. When was that request made? A. I don't recall.

Q. Roughly. A. I don't recall.

Q. Was it in 1969? A. I still don't recall.

Q. Was it in 1970? A. I don't know.

Q. You have no idea? A. No.

Q. Who were the partners who made such requests? (50) A. Well, there were only seven or eight partners left. It could have been Paul Cohen, Joel Held, Charles Matthews. I am just relating the partners that were junior. They asked if they could have representation on the executive committee, which we had them attend certain meetings, not all of them. But they also, in addition, asked, which we granted, for a junior executive committee which represented the entire operation of our firm, consisting of Paul Cohen, Held, Sadlier and Matthews, and they became the—and I believe Leyner prior to the time of his resignation was on that junior executive committee, in turn, reported their needs and desires to the executive committee. We gave them great latitude.

Q. Do you recall the subject of monthly profit and loss statements being discussed at this meeting? A. Which meeting?

Q. The meeting with the younger partners. A. We always discussed it.

Q. Did you discuss with them a request on their part for copies of these statements? A. No, they were always available in my office for them to see. We really didn't like making full distribution of statements because of competitive (51) reasons.

Q. It is your testimony that copies of the monthly profit and loss statements of the firm were always available? A. Yes.

Exhibit 20

Q. I see. Can you tell me whether any of the younger partners availed themselves of the opportunity to look at these statements? A. Yes.

Q. Who, please? A. Paul Cohen, for one. Bob Sadlier —Bob had it anyway because he was in charge of creating these statements.

Paul Cohen on many occasions came in, took a copy home with him, read it, brought it back.

Q. During what period are we talking about? A. It could have been several times after he became a partner and before. Whenever he wanted one, there was always one available.

Q. Even prior to the time he was a partner? A. Yes.

Q. Where did you keep these physically in your office Mr. Hertz? A. In my desk.

(52) Q. What drawer in your desk? A. What drawer?

Q. Yes. A. I don't know what drawer. It was in the drawer of the desk.

Q. All of the partners knew what drawer in the desk to look in? A. Nobody went in my desk. If they asked me for one, I gave them one.

Q. Do you have a specific recollection of Paul Cohen asking you for monthly P & L and you providing it to him, is that right? A. Yes, absolutely.

Q. Can you tell me when? A. As I mentioned previously, on many occasions before and after his partnership.

Q. What accounting basis was the firm of Hertz, Warner on? A. As a guess, I think it was on an accrual basis. I am not sure whether it was cash or accrual. You will have to check with our auditors.

Q. Did it have a fiscal year? A. Yes, June 30.

Q. Do you recall the result in terms of profit (53) and loss for the year-end June 30, 1968? A. Yes.

Exhibit 20

Q. What was it? A. Approximately $2.5 million.

Q. I ask the same question for the year end June 30, 1969. A. Approximately $100,000.

Mrs. Lea: Excuse me?

The Witness: Approximately $100,000.

Q. June 30, 1970. A. Approximately a $4 million loss. Maybe a little bit less. Probably three million. Somewhere between that.

Q. Do you recall the results for the period July 1, 1968, through December 31, 1968, the six-month period? A. July—

Q. July 1, 1968, to December 31, 1968. A. Approximately one million, two.

Q. Profit? A. Yes.

Q. What was the result for the period January 1, 1969, through June 30, 1969? A. We lost approximately a million, one of (54) that million two.

Q. Mr. Hertz, in or about July of 1969 did Mr. Cohn come to you to solicit your advice as to whether or not he should become a partner for Hertz, Warner & Company? A. No.

Q. Did you have any discussions with him on that subject? A. I had discussions, but I am not sure it was July. He would come into my office several times, as he usually does, covering a lot of subjects. I am sure we discussed his proposed partnership, but I couldn't give you the substance of the conversation because I just don't know.

Q. Did you offer him any advice? A. No.

Q. What was your relationship to Mr. Cohn? Were you close to him? A. Yes, very much so over the years.

Q. Was it his practice to come to you for advice? A. Yes, but not financial.

Exhibit 20

Q. What type of advice did he come to you for? A. His personal problems, his marital problems.

• • •

Q. After Mr. Cohn agreed to become a partner in Hertz, Warner, did there come a time when you requested him to produce his capital contribution? A. Yes.

Q. When was that? A. I guess it was early October because his capital was supposed to be up as of July 1, when he was admitted to the firm as an allied member.

Q. What did you say to him? A. I advised him that we have submitted the partnership agreements and his financials to the Exchange (57) and I would like his capital so in the event we do have an auditor from the Exchange come in to examine our books, that all the partners who have so stated they would put up capital would be there.

I asked him, you know, when could he possibly get the moneys that he agreed to put up.

Q. What did he say? A. He said he was getting it.

Q. Was there any discussion with Mr. Cohn at that time concerning whether or not any of the other partners, general or limited, were going to sign the agreement? A. With Paul, no. I had no knowledge that nobody would sign at that time. My knowledge was that everybody was going to sign.

Q. When was the first time that you had any knowledge that someone might not sign the agreement? A. About January of '71.

Q. How did that knowledge come to you? A. Via Mr. Blau or Mr. Meyer.

Q. With respect to the 2000 shares of AT&T stock that Mr. Cohn contributed as his partnership contribution, were you made aware of when these securities came into the firm? (58) A. Paul told me, you know, he was very

happy to report that he got it in. He came in and told me himself.

Q. Were you aware of the form in which they came in? A. He told me he was putting in 2000 shares of Telephone. I didn't see the stock. I never do.

Q. Did you know where he got the shares? A. Yes.

Q. How did you get that information? A. He told me.

Q. At that time or earlier? A. Prior to that time.

Q. Do you know Mr. or Mrs. Fine? A. I met them, yes.

Q. When did you meet them? A. At his wedding. I was invited to his wedding.

Q. Do you recall when that was? A. I don't know when he was married. Paul couldn't remember, so how could I.

Q. Was it before or after his admission as a partner? A. When he was married?

* * *

(60) Q. Do you recall a meeting of partners in December of 1969? A. Yes, we had a partners meeting concerning our forthcoming program and what we intended to do, and because of the market conditions we determined that it would be suitable to contract into a much lesser operation than we had because we were not in need of the offices that were in existence, at that time, and we felt from a good business point of view that our profits could be enhanced by the closing of some of these offices.

Q. Do you recall Paul Cohn making any statement at this meeting?

Mr. Straub: I object to the form of that question and direct the witness not to answer.

Exhibit 20

Q. Do you recall Paul Cohn ever making a request that he be allowed to place the 2000 shares of AT&T stock, which was loaned to him by Peerless, in the position of a subordinated lender? A. I recall Paul at a meeting with Mr. Sadlier came up with a program of his withdrawing his 2000 shares of AT&T, giving them back to his father-in-law, and in place putting in a note for $100,000 payable to the firm from Paul Cohn.

(61) Q. When was that meeting? A. Some time I believe now in '69 or early '70.

Q. You don't recall Mr. Cohn making any statement with respect to those 2,000 shares at a meeting of general partners then? A. Yes, I just told you.

Q. You told me it was at a meeting with Mr. Sadlier. A. Well—no, the two of them created this vehicle which they had conferred with prior to the meeting of the general partners.

Q. This vehicle was voiced at the meeting of general partners? A. Yes.

Q. Do you recall when that meeting was? A. Some time in the latter part of '69 or early '70. Probably December or January.

Q. What did you say with respect to this proposal? A. It was impossible to do. There could be no withdrawal of any general capital without notification to the entire partnership of the firm, which included limited subordinated lenders. An amendment (62) to the partnership would have to be created to take capital from one source and put it into another position.

Q. To your knowledge, Mr. Hertz, did any general partner ever withdraw any of his capital? A. Possibly.

Q. Who was that? A. Offhand any withdrawals that were made by general partners, and I will get back to

your question in a minute, were made in accordance with the partnership agreement, whereby the capital contribution as stated would not go below after withdrawals. But there were some withdrawals of capital that the executive committee had knowledge of.

Q. And in each case, as I understand it, that never put them below the stated capital, is that correct? A. From what I understand, yes.

Q. This is true in the period throughout, up until May 1, 1970, is that correct? A. I don't know. The records will speak for themselves.

Q. I understand. I am working at a handicap. I don't have the record. I would like to get your recollection. (63) A. There may have been one time where certain capital was below their stated capital. Henry Warner's capital may have been below his stated capital as of May 1970. Norman Carney's stated capital may have been below his stated capital. Mine might have been below by 10 per cent.

Q. Was that done pursuant to an amendment? A. This was not done pursuant to anything. That depreciation of capital came about because of the depreciation of the market. Most of us had securities.

Q. I see. A. Since then all capital deficiencies of the senior people have been made up.

Q. But no one actually withdrew capital then? It was just that market conditions may have lowered the capital, is that correct? A. There may have been some withdrawals which created a deficiency in their stated capital, but I am not sure exactly how much and who.

Q. Certainly that never occurred with your knowledge and acquiescence? A. Certainly what didn't occur?

Exhibit 20

Q. Withdrawals that took them below the (64) stated capital. A. The back office had explicit instructions not to return any moneys to any partner without my approval, whether it be limited or general.

Q. So you had no knowledge, nor did you acquiesce in any withdrawal that put any partner below his stated capital? A. No.

Q. All right. Do you know of the National Newark & Essex Bank in New Jersey? A. I know the bank.

Q. Have you had any dealings with them? A. Have I?

Q. Yes. A. In what connection?

Q. In any connection. A. I used to bank there.

Q. Did you live in New Jersey? A. I lived in South Orange, New Jersey, for 20 years.

Q. Has the bank ever had any relationship with Hertz, Warner? A. Yes, they used to loan us money on broker's loans.

(65) Q. How about with Mr. Warner personally? A. I don't know.

Q. When did Mr. Warner leave? A. I believe May of 1970.

Q. Were any documents signed formalizing his withdrawal? A. Yes.

Q. Do you have any copies available? A. Mr. Held has.

Q. Does your counsel here have? A. I don't know.

Mr. Genovese: Mr. Straub, do you have copies?
Mr. Straub: No.

Q. What type of documents were signed? A. Reciprocal leases concerning the partnership to the partner and, in turn, acknowledging that they had a continual financial liability, even though they left the firm, from the time they became a partner until the financial close out of the firm.

Exhibit 20

Q. At the time that Mr. Warner withdrew from the firm in May 1970, Mr. Hertz, was his stated capital up to the amount set forth in the agreement, Plaintiff's Exhibit 31? A. No.

(66) Q. How much was it defficient? A. Approximately $350,000.

Q. Can you explain to me how his account got in that position? A. Yes. His account was prior to the break in the market approximately $700,000, and the break in the market depreciated that to what you see today or what it was as of May 1970.

(Discussion off the record.)

(67) Q. Mr. Warner never withdrew any capital, did he? A. No.

Q. Nor did Mr. Carney? A. Mr. Carney withdrew some capital, but based at the time that he withdrew it, he, in my opinion, was not below his stated capital.

Q. How much did Mr. Carney withdraw? A. Approximately $50,000.

Q. At the time of that withdrawal Mr. Carney was up to full capital, is that correct? A. I believe so.

Q. When was that? A. Sometime in 1968, the latter part of 1968.

Q. When did Mr. Carney withdraw from the firm? A. About the early part of May 1970.

Q. You mean Mr. Carney and Mr. Warner left about the same time, is that correct? A. Within a month of each other.

Q. Who left first? A. I believe—I believe they left approximately the same time.

* * *

(69) Q. Mr. Saluc was a member of the executive committee, was he not? A. He was.

Exhibit 20

Q. Was he replaced on the executive committee? A. No, he was not.

Q. After Mr. Saluc's departure then, the executive committee consisted of yourself— **A. Carney and Warner.**

Q. —Carney and Warner? A. Yes.

Q. On or about July 1, 1969, Mr. Hertz, were you aware of any change in the financial picture of Hertz, Warner? A. I was always aware of my financial picture.

Q. Were the prospects bright? A. Yes, we had ample capital. At that time I think we had $15 million in capital.

Q. What was the capital as of December 31, 1969? A. I would say it was in excess of $12 million.

Q. When did you receive the financial report

* * *

(76) at this moment.

Q. Did you discuss your testimony here today with Mr. Straub before you came to this meeting? A. Whose testimony?

Q. Your testimony that you were going to give. A. No.

Q. You didn't discuss it? A. Not that I know of.

Q. I see.

Did you discuss it with anyone? A. Not in relation to the testimony, but I discussed certain things with Mr. Warner to refresh my memory concerning certain things of this case.

Q. Are you sure? A. Positive.

Mr. Straub: Let's get that cleared up right now. If you ask him a question without the characterization of testimony, I think you will get the answer you are looking for.

If you prefer, I will wait until the end of the deposition.

Exhibit 20

Mr. Genovese: You can make any statemet (77) you want to.

Mr. Straub: Setting aside for a moment the word "testimony," Mr. Hertz did you and I discuss anything which Mr. Genovese may have asked you about today?

The Witness: Possibly, yes.

Mr. Genovese: Are you finished?

Mr. Straub: Yes.

Mr. Genovese: All right.

Q. Mr. Hertz, did there come a time in 1970 when Mr. Cohn's responsibilities [illegible] the firm of Hertz, Warner shifted? A. Yes.

Q. Can you tell us how that came about? A. We had various problems in the back office which he would have wanted to take on, and which I finally agreed with Mr. Sadlier that he would act as co-manager in the back office with Mr. Sadlier to correct certain problems that existed in the back office.

Q. What were those problems? A. Varied.

Q. Do you recall any specifically? A. We had cage problems, we had margin

* * *

By Mr. Genovese:

Q. Mr. Hertz, you referred to Messrs. Blau and Meyer as special limited partners. A. Yes.

Q. Is there any documents which refers to them in that respect? A. Well, the initial discussion with Mr. Meyer and Mr. Blau in preparing the 1969 agreement—

Exhibit 20

Mr. Galligan: Excuse me, Mr. Hertz. Let me interrupt. The question is as I understand it: Is there any document that reflects that.

A. Not the final agreement, no. We had in our original draft, as you will recall, written in special partner and Mr. Meyer and Mr. Blau felt that it was not (117) necessary for the word special to be there.

We didn't see any significance to the word special. The reason why we have used the word special is because the agreement with Mr. Meyer and Mr. Blau at that time, in preparing the 1969 agreement, was that they were the only two limited partners that would share in the ratio losses of the firm and that's what made them special as the word implies.

Q. What about Mr. Shiff? A. And including Mr. Shiff.

Q. Those were the only three? A. Yes.

Q. Do you know who originated the term, "special limited partners"? A. I really don't know. I don't know how the word came out to exist. It's a meaningless word. I couldn't give you that answer.

Q. Did you have a discussion with Mr. Held concerning that term? A. If I did, I don't recall.

Q. Did you have a discussion with Mr. Held as to the rights and obligations of the Meyer-Blau group so-called? A. It's very possible I did based on my conversation (118) with Meyer, Blau and Shiff at the time of—at their offices.

Q. Did Mr. Held ever tell you, in fact, Blau, Meyer and Shiff were general partners under the law? A. That particular understanding was kicked around by many attorneys. When the final phase of our operation came close to being closed up, there were many interpretations of that.

So I don't know whether it was a legal opinion on his part or was just an offhanded—

Exhibit 20

Q. But did he ever tell you that? A. I really don't recall.

Q. Do you recall having a conversation with him prior to the time that he signed the partnership agreement in which he told you that, in fact, Messrs. Meyer, Blau and Shiff were general partners?

Mr. Galligan: By "he," we are talking about Mr. Held?

Q. Mr. Held. A. I don't recall.

Q. You don't recall any such conversations? A. I've heard the phrase used by many people. I guess maybe in our own mind we were taking the position because of the relationship with Hertz, Warner that they could be construed as general partners rather than limited (119) partners but I have never had a true legal opinion that that be the case.

It was never tested by the courts or by the arbitration or the New York Stock Exchange.

Q. Was it Mr. Held's responsibility to obtain the signatures of Messrs. Meyer, Blau and Shiff to the partnership agreement? A. It was his responsibility to obtain all the signatures.

Q. Including theirs? A. Yes. Because when I had left the meeting with Messrs. Shiff, Meyer and Blau, I was certainly led to believe that everything was in good form. I mean it was a very amicable meeting.

Q. What meeting was this? A. This was a meeting that was held in the affiliated offices of Hertz, Warner sometime in the latter part of 1969 regarding the new arrangement that we had set up for these three gentlemen and at that time in addition to their becoming limited

partners, who would share the losses of the firm in relationship to the generals sharing losses, it was also agreed upon that the point structure for Meyer, Blau, Shiff, Hertz, Warner would be basically on $50,000 per point and that's how they were—their

* * *

The Witness: I'm sure this agreement was sent out after November but you asked me about a meeting that took place to create an understanding so we could prepare a final draft of the agreement (124) with the three gentlemen involved and then when I put that to bed, I related that information of the understanding I had with them to Mr. Held.

All he did was copy what my understanding was with the three gentlemen involved. That's all and there was never a question, even if we can produce this memorandum, that altered my understanding with them with the exception of new things that they thought of but never a question concerning their capital contribution or their loss ratio.

They did come up, as I say, with that one specific request which I denied.

By Mr. Genovese:

Q. Did they tell you that it was on the basis of that request that they refused to sign the partnership agreement? A. Well, I think it was on the basis of the total memorandum that took place. I don't recall exactly what was in that total memorandum but it was not in relationship to them having any fears regarding Hertz, Warner & Company or anything like that because if it was that, he would have withdrawn.

Exhibit 20

Q. Did either Mr. Held or Mr. Sadlier ever tell you that they were signing the partnership agreement on the (125) condition that all general and limited partners would sign the agreement? A. No, never.

Q. Did there come a point in time, Mr. Hertz, when either Mr. Meyer or Mr. Blau or their counsel communicated to you that they would not sign the agreement in any form? A. Well, yes, I guess they did but not necessarily through their counsel. I guess that was after we had closed our doors, in May of 1970.

Q. Not prior to May of 1970? A. No. We were constantly talking about the agreement as to changes and it just wasn't moving—I presume if I had followed their memorandum, they would have signed the agreement.

So, I'll see if we can produce that memorandum. There were just no major changes in the agreement other than basic philosophy.

Q. Did Mr. Meyer and Mr. Blau take the position with you that their rights in the Hertz, Warner partnership were governed by the agreement of July 1, 1968? A. I don't think so.

Mr. Genovese: Would you mark for identification, copy of a letter dated July 6, 1970 (126) addressed to Hertz, Warner & Company, attention Irving E. Hertz, signed by Arthur I. Meyer.

(Copy of letter dated July 6, 1970, addressed to Hertz, Warner & Company, attention Irving E. Hertz, signed, Arthur I. Meyer marked Plaintiff's Exhibit 39 for identification, as of this date.)

Q. Mr. Hertz, I show you a copy of Plaintiff's Exhibit 39 for identification and ask you whether you received

this letter from Mr. Meyer. A. Probably, yes.

Q. Does this letter refresh your recollection that Mr. Meyer was taking the position that his rights in the Hertz, Warner partnership were governed by the July 1, 1968 agreement? A. Well, the letter so states it but as I indicated to you before, anything that occurred after the close down of the business which was May of 1970—this came in in July but during the time that we were in operation, they never took that position.

Q. Is it your testimony that Plaintiff's Exhibit 39 represents the first time that Mr. Meyer took that position? A. That's the only time I got a memorandum that I can recall.

Q. No, that's not my question. (127) A. I really don't—I don't recall having any conversations during the time that we were in operation, that Mr. Meyer and Blau took this position.

Q. When was it that Hertz, Warner ceased operation? A. I believe in May of 1970.

Q. Plaintiff's Exhibit 39 refers to a letter dated April 3, 1970, which the undersigned, namely, Mr. Meyer and Mr. Blau wrote to you.

Do you recall receiving such a letter? A. If I did, I don't have it. If it's on record, it's on record, I don't know.

Q. Would you search your files and see if you have such a letter? A. Well, I know I don't have it and I've searched my files for a lot of things and I didn't run across this but I'm sure Mr. Meyer and Mr. Blau have a copy of it.

Q. We have taken appropriate steps to obtain it from them but we did inspect the files of Hertz, Warner as you know and we were unable to come up with that letter. A. I'm sure Mr. Meyer must have a copy.

Exhibit 20

Q. Did you have a conference with Mr. Meyer and Blau on or about April 3, 1970, at which time they delivered a letter to you? A. I wouldn't recall.

* * *

Q. Do you have any recollection, Mr. Hertz, of what the profits of Hertz, Warner were for the fiscal year ending June 30, 1968? A. Approximately two and a half million dollars.

Q. I show you what has been marked Plaintiff's Exhibit 36 for identification and ask you whether this document reflects the profit of Hertz, Warner for the year ending June 30, 1968? A. This is the profit? It's $2,444,000. I would say yes.

Q. Do you have any recollection as to what the profit of Hertz, Warner was for the period ending December 31, 1968? A. The first six months of 1968 or the first six months of 1969?

Q. Fiscal 1969. A. I would say approximately, if I recall, a million two.

Q. I show you now Plaintiff's Exhibit 31A for identification and ask you whether that refreshes your recollection. A. It says here a million dollars. I guess that's (145) what it was.

Q. Do you have any recollection, Mr. Hertz, as to whether the firm of Hertz, Warner earned any profits for the month of January, 1969? A. I don't know. I couldn't tell you for that month.

Q. I show you Plaintiff's Exhibit 32 for identification and ask you whether that refreshes your recollection? A. If it's there, these were prepared by the controller or auditors. I guess this would be—apparently we did earn $138,000 for the month of January. That's where I got my million two, I guess. Maybe my dates were—

Exhibit 20

Q. You don't question the accuracy of the report, do you? A. At this moment?

Q. Yes. A. If it's my report, no.

Q. I just wanted to show you. A. I have no reason to.

Q. Mr. Hertz, do you have any recollection as to whether Hertz, Warner earned a profit for the month of (146) February, 1969? A. No, I don't.

Q. How about the month of March, 1969? A. I can only answer your question in the manner that between January of 1969 or our fiscal year between 1969 and 1970 apparently we lost a substantial amount of money for those ensuing months.

Q. Could you restate the period? A. For the year 1968, as we discussed before, Hertz, Warner showed a profit of approximately two and a half million dollars.

In the—starting the new fiscal year from July 1969 to June—May—June of 1970, the first several months of the new fiscal year we made money and the balance of the year we had lost the majority of that money which we made.

Now, by months—I would presume as of February, we would have started to lose a substantial amount of money.

Q. I show you Plaintiff's Exhibit 33 for identification and ask you if that refreshes your recollection as to the losses sustained by Hertz, Warner in the period February, March 1969? A. This only shows March. What happened to February?

* * *

(151) Q. Mr. Hertz, referring to Exhibit 32 for identification, which is the financial statement of Hertz, Warner as at January 31, 1969, was it the practice of Hertz, Warner's accountants, Mirsky & Company to deliver monthly reports to you, such as, Exhibit 32? A. In the early years of Hertz, Warner we were getting a monthly statement from Mr. Robert Mirsky & Company and a

monthly P & L and then when we had our own control system, we were doing it internally.

I don't know whether this cross checked with his last statement or whether we picked it up after that because of reduction of costs, you know, our control operation but from this point back, I'm sure he was preparing the statements each month.

Q. You are not sure whether from that point forward he was preparing them? A. I couldn't tell unless they were produced. Marvin can tell you better than I because of his bills to us.

Q. Referring to Plaintiff's Exhibit 33, you received one for the period ending March 31st? A. Then he was doing it. He was still doing it.

Q. Did you receive copies of these? A. I believe so, sure.

Q. Who else in the firm received them? (152) A. Well, they were sent down to me primarily and I think to the control operation and anybody that wanted a copy was—it was available in my office.

We did not make distribution to all the people because—

Q. I would like to know who it was distributed to? A. I said it was primarily distributed to me and I showed it to Mr. Warner and Mr. Carney, part of the executive committee and Mr. Saluc and any other general partner who wanted them.

Q. Did you review them when they came in? A. I always reviewed them.

Q. Mr. Hertz, can you place the time when you had your first conversation with Paul Cohn as to his being admitted as a partner?

A. I don't really recall. Which partnership are you talking about?

• • •

Exhibit 20

Q. Did you have any discussions with Mr. Held in or about June or July of 1969 regarding subordinated lenders? A. I wouldn't know.

Q. Do you recall Mr. Held telling you that he had received communications that certain subordinated lenders were going to cancel their loan agreements? A. It may very well be.

Q. I'm not asking you what may be. Do you recall? A. I just don't know. I mean at that particular time I know we had people coming and going out, people whose subordinated agreement was due. I think they were one-year agreements.

Q. Do you recall the anniversary dates of those agreements? A. They were varied. Our subordinated money was not in at the same date. There were various dates. We had approximately $1,550,000 of subordinated money but (156) it all didn't come in on one date and expire a year later.

Q. It's your recollection that there was no prime anniversary date so to speak where more loans were due than others? A. I don't really know. I know we had a million and a half dollars in. I don't know the anniversary dates of each of the individual loans, no, I do not. I couldn't pinpoint that date for you.

Q. Do you have any recollection as to whether more of them were due on December 31st than any other date? A. I couldn't give you the answer.

Q. You couldn't tell, all right.

Did you ever have a conversation with Mr. Held and Mr. Sadlier in which you told them that you would guar-

antee them against any losses from the partnership of Hertz, Warner that they might sustain? A. No.

Q. Are you sure of that? A. Positive.

Q. Mr. Hertz, referring back again to the monthly financial statements, do you have any specific recollection of Mr. Cohn taking any of these particular statements home, referring to the ones that have been marked for identification at this proceeding. (157) A. I don't know whether he took those particular ones home or any others but I do know because of our relationship and the geographical location of the executive people, which were all in one office, that on many occasions—it was on a constant basis that he was in my office and whenever he wanted to see a statement, he was permitted to take one. Whether he took those particular ones, I don't know.

Q. Do you have any recollection, specific recollection of him taking any? A. Yes, surely.

Q. When? A. I don't know but I know he took them. We discussed it a number of times. He asked me how we were doing and I showed him these things.

Q. When did he ask you how you were doing? A. I don't know.

Q. Did he ask you how you were doing before he became a partner in 1969? A. We had conversations of that and it was fairly well-known things were going pretty good in 1968 and the early part of 1969 and we were quite proud of our results so I don't believe we had any reluctancy about discussing our performance at that time.

(158) Q. Did you tell Mr. Cohn at any time that you were losing money in February, March, April, May, June of 1969? A. I think it was generally known we were.

Q. Did you tell him? A. I don't know if I specifically told him or not.

Exhibit 20

Q. Did you tell Mr. Held? A. I think people generally knew it. I think we did, yes.

Q. Did you? A. I don't recall telling them specifically but I'm sure it was well known.

Q. You have no recollection of telling either Mr. Held or Mr. Cohn, is that correct? A. I don't have a recollection of telling them specifically, but I'm sure it was told to them.

Q. Mr. Hertz, I'm not interested in what you are sure was told to them. I'm asking you what your recollection is. A. I don't recall telling him specifically, on a specific date that we lost money in February or March, but I do know that they knew.

Q. How do you know they knew? A. We had discussions of our various partnership meetings.

(159) Q. And they were partners at the time? A. No, but they were brought in.

Q. They attended partnership meetings before they became partners, is that what you are testifying to? A. Yes.

Q. When was it? Give me one meeting if you can in 1969 when Mr. Cohn attended a partnership meeting. A. I can't give you a specific date.

Q. Did you hold partnership meetings regularly? A. Within a reasonable time, yes.

Q. How often? A. Maybe once a month.

Q. And who was present at the partnership meetings? A. Depending upon what the meeting was about. Sometimes we held a total partnership meeting. Sometimes we held certain partners' meetings where it referred to that particular area of the business.

Q. Mr. Held was also present at partnership meetings before he became a partner? A. Yes, many times. He was house counsel.

Exhibit 20

Q. And Mr. Sadlier? A. Yes.

Q. Who else other than partners? A. Paul Cohn. All those people in sensitive areas.

* * *

Q. Did Mr. Warner report to you that Mr. Cohn offered to put up more than $100,000 as capital contributions? A. No, actually in the final conclusions of their meetings, I guess, it was determined that Paul would put up $100,000.

Q. Did the executive committee discuss the form in which the 100,000 would be put up? A. Well, I was advised, I think, at the time that Paul Cohn was going to put up securities, subordinated to him from his father-in-law.

I didn't know it was Peerless Mills at the time. It was coming from his father-in-law. I never saw the documents but I knew it was securities.

Q. Securities from his father-in-law? A. That's what I understood.

By Mr. Genovese:

Q. Mr. Hertz, do you have any knowledge as to whether the Stock Exchange approved Mr. Cohn's capital borrowing? (165) A. Subordinated agreement is on file, isn't it? We have a copy of that.

Q. That's not my question. Do you have any knowledge as to whether they approved it? A. I believe—personal knowledge, yes. I don't know how I have it but I know it was approved.

Mr. Galligan: Did you say his capital borrowing or his capital contribution?

Mr. Genovese: Capital borrowing.

Exhibit 20

Q. Do you know whether the exchange ever questioned Mr. Cohn's capital contribution? A. I wouldn't know.

Mr. Genovese: Would you mark this as the next exhibit, please.

(Copy of a letter dated May 1, 1970 on the letterhead of the New York Stock Exchange marked Plaintiff's Exhibit 41 for identification, as of this date.)

Q. I show you a copy of a letter dated May 1, 1970 from the New York Stock Exchange to Hertz, Warner & Company, attention Mr. Sadlier, which has been marked Plaintiff's Exhibit 41 for identification and ask you whether you have ever seen it before. A. I don't know. It wasn't addressed to me, so I really couldn't give you an answer.

(166) Referring to the last paragraph on page 2 of the letter, would you read that, please, Mr. Hertz. A. This one, "Examiner indicates that Paul Cohn"—

Q. To yourself. A. Right.

Q. Did you ever discuss that with Mr. Sadlier? A. Well, I had some knowledge that apparently whatever documentation was required hadn't been submitted but was since corrected.

Q. And it's your understanding that the exchange, in fact, approved the loan? A. That's what I understand. It was considered good capital after the subordinated agreements were in good form.

Q. Do you have any documentation reflecting that? A. I wouldn't personally, no.

Q. Do you know of any? A. I guess Marvin Furst would have it. He was the auditor.

* * *

Exhibit 20

HENRY WARNER, having been duly sworn by the Notary Public (Marvin A. Morgenthal), was examined and testified as follows:

Examination by Mr. Genovese:

Q. State your full name for the record, please. A. Henry Warner.

Q. Where do you reside, Mr. Warner? A. 39 Fairfield Terrace, Short Hills, New Jersey.

Q. Mr. Warner, would you give us a brief statement of your educational background, please? A. I am a college graduate.

Q. From what school? A. Massachusetts Institute of Technology.

Q. After graduating college, what did you do? A. I went into the real estate business for four years.

(4) Q. From the real estate business, where did you go? A. At the age of twenty-three, I started with Merrill, Lynch—then it was—Pierce, Fenner and Beane.

Q. What year was that? A. 1952.

Q. For how long did you stay with Merrill, Lynch? A. Approximately two years.

Q. Where did you go from there? A. Heller & Meyer.

Q. That was in 1954? A. Approximately.

Q. What did you do at Heller & Meyer? A. I was a registered representative.

Q. For how long did you stay with Heller & Meyer? A. Approximately six years.

Q. Did you act as a registered representative throughout that six-year period? A. Yes, I did.

Q. That brings us to approximately 1960; is that correct? A. That's correct.

Exhibit 20

Q. And in 1960, where did you go? (5) A. I moved to Hirsch & Co.

Q. In what capacity? A. Branch manager and registered representative.

Q. For how long did you stay with Hirsch & Co.? A. Three years.

Q. Throughout that three-year period, did you remain as a branch manager and registered rep? A. Yes, I did.

Q. Were you a partner at all? A. No.

Q. What did you do in 1963? A. January 1, 1963, I became a general partner of Lieberbaum & Company.

Q. Were you concerned with any particular area of the firm's activities? A. Yes. I was responsible for the Newark branch office, which I formed.

Q. For how long were you with Lieberbaum & Co.? A. Until October 7, 1963.

Q. What did you do then? A. We formed what was then known as Hertz, Newmark & Warner on October 8, 1963.

Q. Who were the founding partners of Hertz, Newmark & Warner? (6) A. To the best of my recollection,—I will name some of the people that I can recall.

Besides the three named partners, in addition, Norman Narner, Paul Cohen, Robert Flint, who is now deceased, Jerry Perlman, Morton Borhrer. At the moment, I can't think of any others. That may be the total list.

Mr. Galligan: Excuse me.
Is that Perlman, P-e-a-r-l, or P-e-r-l?
The Witness: I'm not sure.

Q. Prior to the formation of Hertz, Newmark & Warner, did you have any discussions with Paul Cohen relative to the formation of the firm? A. No.

Exhibit 20

Q. When did you first meet Paul Cohen? A. On the evening of October 8, 1963.

Q. Under what circumstances? A. We had an opening party.

Q. Did you have any particular area of responsibility with respect to the firm of Hertz, Newmark & Warner? A. Yes, I did.

For a period October 8, 1963 until June 30, 1964, I continued in the Newmark operation and was the partner in charge of that branch.

Q. That was a branch office of Hertz, Newmark &

* * *

(11) was quite unexpected.

I returned to work on February 29, 1968. I remember the date, because it was a leap-year date and I made it in February, which was my objective. Paul was one of those who truly greeted me warmly upon my return, and I remember that well. From that point forward, my relationship with Paul became close.

Q. Was that relationship, aside from being a personal one, a working relationship? A. The personal side only involved perhaps a visit at my home one time and an invitation to his wedding, so it was on a business basis that we became closer.

Q. Was there any particular area of Hertz, Warner's activities that Cohen was involved in after February 29, 1968? A. Yes.

Q. What was that? A. He became involved in the area of syndication.

Q. Were you involved in that area? A. Yes, I was.

Q. Did Paul work directly under you or directly for you, or was there someone else that he was reporting to? A. I would like to say that he worked directly with (12)

Exhibit 20

me, and he had a lot of authority, which was well earned because of his keen mind and knowledge of what he was doing.

Q. Do you have any recollection when it was that you were invited to Paul's wedding? A. Yes, I do.

Q. When was that? A. It was around Labor Day of 1968.

Q. When did you first hear of the plaintiff in this action, Peerless Mills? A. I don't recall.

Q. At the wedding that you attended, when Mr. Cohen was married, did you meet Mr. Cohen's father-in-law, Mr. Fine? A. I don't recall specifically, but it's highly likely that I shook hands with him.

Q. Did there come a time, Mr. Warner, when you had discussions with Paul Cohen concerning his possible admission as a partner of Hertz, Warner & Co.? A. Yes.

Q. Can you place that time? A. I would estimate that time to be the early spring of 1969.

Q. Do you recall the first such discussion? (13) A. I can't be precise as to the date, if that's what you are requesting.

Q. Do you recall the substance of the first such discussion? A. Yes, I do.

Q. Can you tell me what that was? A. I would be happy to.

Paul, in his working with me, indicated that he felt just like a partner, and, truly, Paul performed as one, even when he was a department head; namely, syndicate manager. He was tireless and his devotion to the firm exceeded that of general partners.

Paul indicated to me that he would like to become a partner of the firm again.

Exhibit 20

Q. What did you say to him? A. I felt that this was a proper thought on his part and that I would recommend to the others that he become a partner.

Q. Do you know what Paul was earning at that time? A. I don't recall.

Q. When was the next conversation that you had with Paul Cohen concerning his becoming a partner of Hertz, Warner? A. I cannot limit it to the one conversation. This (14) whole period, like, evolved, as far as I am concerned, in looking back at this time, but the gist of the communications between us is as I just described.

Q. Did you ever discuss finances with him in these conversations? A. I don't recall.

Mr. Galligan: Mr. Genovese, let me just complete that brief area of compensation of Cohen that you touched on, if I may, with just one question to Mr. Warner.

Do you recall, Mr. Warner, whether or not Mr. Cohen was paid at that time on a straight salary, or was he getting salary and commission?

The Witness: During the period of time he functioned as syndicate manager?

Mr. Galligan: Yes. Mr. Genovese asked you what he was being paid.

The Witness: I don't recall if he had any special arrangement relative to his work as syndicate manager, and I would presume he was compensated for his production in the same manner as all other registered reps.

Mr. Genovese: You don't know that, though?

* * *

Exhibit 20

(16) Q. Did there come a time, Mr. Warner, when you on behalf of the firm of Hertz, Warner proposed to Mr. Cohen certain terms and conditions under which he could become a partner of Hertz, Warner & Company? A. I don't recall any discussions outside of the fact that he was going to be a three percent partner.

Q. When you say "a three percent partner," does that mean that he would participate in three percent of the profits of Hertz, Warner? A. That is correct.

Q. Does it also mean that he would participate in three percent of the losses of Hertz, Warner? A. That is not correct.

Q. Other than the fact that Mr. Cohen was to become a three percent partner of Hertz, Warner, did you discuss any of the other financial terms of his proposed partnership with him? A. I don't recall that either.

Q. You don't recall? A. No.

Q. Do you recall what his draw was to be? A. I believe the whole subject is academic, because for the fiscal year beginning July 1, 1969, if my memory serves me correctly, all general partners of the firm, no (17) matter what their percentage of profits were, drew the same rate of compensation; namely, $24,000 a year.

Q. Was there a salary in addition to a draw? A. No.

Q. Did you have any discussions with Mr. Cohen concerning his capital contribution to the partnership? A. Yes.

Q. What was the substance of those discussions? A. Basically, Paul volunteered that it would be no problem for him to contribute $100,000 in capital.

Q. Did you have any discussion with him as to the source of that capital contribution? A. Yes.

Exhibit 20

Q. What did you say to him and what did he say to you? A. He volunteered that his father-in-law was well-to-do and that he had married his only daughter, and he would request capital from him.

Q. Did you know the form that that capital would take? A. I don't recall.

Q. In the course of your discussions with Mr. Cohen concerning his "partnership," did you ever render any estimates to him or projections as to what he might (18) earn as a partner? A. No, I did not.

Q. Did you discuss with Mr. Cohen what his share of the firm's losses was to be under the partnership? A. I don't recall.

Q. Mr. Warner, after you had the initial discussion with Mr. Cohen in which you have testified he in substance requested a partnership, what did you do about it? A. I brought it to Irving Hertz's attention and recommended that we propose it to the executive committee because I favored Paul's becoming a partner.

Q. What did Irving say to you? A. He agreed.

Q. Who was on the executive committee at that time? A. In addition to Irving and myself, Norman Carney and Jay Saluc.

Q. Did the executive committee have a meeting at which they discussed Mr. Cohen's proposed partnership? A. The executive committee met regularly every Monday evening and there was no formal agenda, and I'm sure at the next Monday's session I brought it up.

Q. Can you place that in point of time? A. I would estimate this probably occurred around (19) April of 1969.

Q. Do you recall the subject of any other employees of Hertz, Warner becoming partners coming up at that time? A. No, I do not.

Exhibit 20

Q. Did Hertz, Warner make partners in addition to Paul Cohen in or about July 1, 1969? A. I'm not certain, but it's possible that Bob Sadlier became a partner at that time, and, in addition, it's possible that Joel Held became a partner at that time.

Q. Did you have any discussions with Joel Held concerning his partnership at Hertz, Warner? A. I don't recall specifically having conversations with Joel.

Q. How about Bob Sadlier? A. Nor with Bob.

Q. Was James Sadlier admitted to partnership on July 1, 1969? A. That's possible.

Q. Did you have any discussions with him concerning his partnership? A. It's possible that I did.

* * *

Q. Did Mr. Matthews work with you primarily in Hertz, Warner? A. Yes, he did.

Q. Do you recall what Mr. Matthews's capital contribution to Hertz, Warner, was to be? A. Yes, I do.

Q. What was it? A. $10,000.

Q. What about Mr. Held?

Do you recall what his capital contribution was to be? A. I think it was also $10,000.

Q. Did there come a time, Mr. Warner, when a partnership agreement was prepared which was dated as of July 1, 1969 from Hertz, Warner & Company? A. Yes.

Q. Did you participate in any way in the preparation of that partnership agreement? A. I believe it was a routine amendment and that the only changes would be listing the new partners.

Q. Do you recall whether anyone's capital contribution who was a partner as of July 1, 1968, was reduced? (23) A. Yes, I do.

Exhibit 20

Q. Whose was reduced? A. I believe that Irving Hertz's capital contribution on July 1, 1968 was $750,000, and I believe it was reduced to $550,000 on July 1, 1969.

Q. Do you recall any others? A. No, I don't.

Q. What about your own capital contribution? A. I believe I might have moved it up from $500,000 on July 1, 1968 to $550,000 on July 1, 1969.

Q. Did you keep yourself generally advised with respect to the financial affairs of Hertz, Warner? A. No.

Q. Was there someone else in the firm who concentrated in that area? A. My partner, Irving Hertz, was more concerned about the financials than I was.

Q. As of the spring of 1969, were you aware of the profit that had been earned by Hertz, Warner in the prior fiscal year? A. You are referring to the fiscal year ending June 30, 1968?

Q. Correct. A. Yes.

(24) I certainly knew it.

Q. What was the amount? A. My recollection is that it was moderately in excess of $2 and a half million.

Q. As of the end of January, 1969, were you aware of the financial condition of Hertz, Warner at that time? A. Are you referring to the net worth or the profit and loss?

Q. The profit and loss. A. Yes, I was.

Q. Do you recall approximately what that figure was as of January 31, 1969? A. Yes.

I believe we earned approximately $1 million for the six months ending December 31, 1968.

Q. Do you know whether the accountants for Hertz, Warner prepared monthly financial statements? A. I don't recall who was preparing the monthly financials at that time.

Exhibit 20

Q. Were monthly financials prepared? A. Monthly financial statements were available, and were prepared. In answer to your question, yes.

Q. Did you receive copies of them? (25) A. Yes, I did.

Q. Did you review them? A. In all fairness, I looked at them. I looked at the bottom line and then went back to my business.

Q. As of June 30, 1969, did you know the profit and loss picture of Hertz, Warner? A. Yes, I did.

Q. Do you recall what that was, approximately? A. I believe for the fiscal year ending June 30, 1969, we earned approximately $100,000.

Q. Were you aware that during the period January through June of 1969 Hertz, Warner was suffering losses? A. We received monthly reports and I would think that the monthly figures reflected losses during that period.

Q. Did you disclose any such losses to Mr. Held? A. I do not recall.

Q. To Mr. Cohen? A. I do not recall.

Q. To any other partner that was being admitted on July 1, 1969? A. I do not recall.

Q. Did you sign the partnership agreement of July 1, 1969? (26) A. I believe that I did, yes.

Q. Do you recall when it was that you signed it? A. I don't think they were physically prepared until the fall of 1969. So, it could have been no sooner than that.

Q. Incidentally, Mr. Warner, the monthly financials of Hertz, Warner, to whom were they distributed as a matter of course? A. Members of the committee each received a copy.

Q. Can you recall physically how the agreement of July 1, 1969, was presented to you?

Do you recall the circumstances? A. No, I do not.

Exhibit 20

Q. Do you recall whether there were any other signatures on the agreement at the time you signed it? A. I believe it was our policy at that time to send everybody a single copy of the agreement, and they were individually signed by each partner separately, and then the house counsel coordinated all the signatures for a master copy to be distributed.

I believe that was our technique at that time.

Q. Did it ever come to your attention that certain of the persons who were to be signatories to the July 1, 1969 partnership agreement had not signed it? (27) A. Yes.

Q. When was that? A. I would estimate that was in the December 1969-January 1970 period.

Q. How did that fact come to your attention? A. I don't recall.

Q. Do you recall who it was that had not signed the agreement? A. I recall some of the people.

Q. Can you name them, please? A. Yes.

People associated with Arthur Meyer and Joseph Blau, so that would include certain members of Arthur Meyer's family.

Q. Did you have any discussion with anyone concerning the reason why the so-called Meyer-Blau group did not sign the July 1, 1969 agreement? A. No.

Q. Did you know the reason? A. I learned in conversations with Irving Hertz that there were certain modifications that they proposed to the articles of partnership.

Q. Did he tell you what the modifications were? A. I don't recall.

(28) I might say they were of a technical nature, not of a substantive nature, not with relation to points and responsibilities, but they were more legal than fundamental.

Exhibit 20

Q. As of the fall of 1969, to your knowledge, did all of the general partners of Hertz, Warner contribute the capital specified in the July 1, 1969 agreement? A. I don't recall.

Q. Do you know whether you ever knew that fact? A. I don't recall.

Q. Did you ever have any discussions with anyone concerning that? A. I can't think of any.

Q. Had you contributed your capital? A. Yes.

Q. Had Mr. Sadlier, Mr. Robert Sadlier? A. I don't know.

Q. Did Mr. Cohen? A. I don't recall.

Q. What about Messrs. Meyer and Blau and the group they represented? A. I don't recall.

Q. To your recollection, Mr. Warner, did there come a time when the so-called younger partners at Hertz, Warner (29) such as Mr. Cohen, Mr. Held, Mr. Matthews, meet a request of the executive committee that they be given greater authority in the firm? A. Yes. I recall that.

Q. Do you recall when that was? A. I would estimate approximately January of 1970.

Q. Was that at a meeting? A. At Hertz, Warner, we didn't necessarily have formal meetings. We were always together and there was great freedom of speech, and one of the pleasures of our association was to let our hair down with one another on a constant basis, so I learned of this just by being there, and not on any formal basis.

Q. Do you recall what it was they asked for? A. Not specifically.

Q. Did they ask for profit and loss statements, to your recollection? A. I don't recall.

Q. Do you recall what disposition, if any, was made of their request? A. I don't recall.

Exhibit 20

Q. Did Mr. Cohen submit an application to the Exchange in connection with his admission to Hertz, Warner, as Mr. Warner did, as you just testified? A. I'm sure that he did, but I don't recall.

Q. Did there come a time, Mr. Warner, when your capital in Hertz, Warner & Company was below the stated amount as reflected in the July 1, 1969 partnership agreement, Plaintiff's Exhibit 31? A. Yes.

Q. Could you tell me when that was? A. My capital contribution was in the form—mostly in the form of securities, and as you might recall, the period through June of 1970 was one of sharply declining market prices, and as a result, my capital account suffered substantially.

Q. This is June of 1970? A. Well, the period January 1, 1970 through June 30, 1970, was one in which there was an historical stock market break.

Q. So, it was within that period, January 1, 1970? (41) through June 30, 1970? A. That my capital account, which was mostly securities, was in a declining phase.

Q. Did you have securities segregated in a capital account which was separate from a trading account, or was it all in one? A. I received a monthly statement that reflected my securities account, which was counted toward my capital contribution.

Q. Well, were you free to deal with that account as you chose? A. Yes, I was. It was a regular customer's type account.

Q. Did you in the period January 1, 1970 through June 30, 1970, make withdrawals from that account? A. I made certain substitutions in my capital account.

Q. Do you recall those substitutions? A. I believe I do. I believe I delivered out ten thousand Development Corp., and received in ninety Lyntex Bonds, and 1,000 Republic National Bank.

Exhibit 20

Q. Is that the full extent of the substitutions you made? (42) A. I believe so.

Q. Do you recall the value of the ten thousand Development Corp., at the time you delivered it out? A. No, I do not.

Q. Do you have an approximate idea? A. Yes. I think it was trading at approximately $16 a share, so I delivered out approximately $160,000 worth of value.

Q. Do you recall what was received into your account? A. Yes.

I bel ;ve the ninety Lyntex Bonds were then trading about $70 and that the 1,000 Republic National Bank was also trading at $70.

So, the combined value would be in the combined range of $130-plus thousand.

Q. Did you also hold Leasco Warrants? A. Yes, I did.

Q. Was anything done with respect to the Leasco Warrants? A. Yes.

Q. Could you tell me what that was? A. Yes.

Sometime in late June of 1970, Hertz, Warner & (43) Company sold out all securities held by general partners and limited partners, and my Leasco position was sold at that time, the proceeds going to Hertz, Warner & Company.

Q. Do you have any recollection, Mr. Warner, starting with the period January of 1970, as to the approximate amounts that you were under capital at that time? A. I personally?

Q. Yes. A. I would estimate that my account, until the real crash, which occurred in May, was always above capital.

Q. As of June of 1970, when you testified the Leasco securities were sold, did they strike a balance on your capital account as to determine what was due, if anything?

A. I received a monthly statement, and I know approximately what the credit balance was at the end of June of 1970.

Q. Were you under capital at that time? A. Yes, I was.

Q. By how much? A. I believe the proceeds of my account, after the sale of the Leasco Warrants, was approximately $201,000. (44) My stated capital was $550,000. So, at that point, relative to the point of stated capital, the differential represents the answer to your question.

Q. Did you enter into an agreement to pay to Hertz, Warner & Company the difference in your capital? A. Yes, I did.

Q. Can you state the substance of that agreement? A. Basically, it was a note.

Q. For how much? A. For the difference. The three hundred forty-eight odd-thousand dollars.

Q. How was that paid? A. There were two lump-sum payments of $150,000 and $50,000, and $2,000 per month.

Q. When is the last such payment due? A. I would estimate about the end of 1975.

Q. Do you recall whether Mr. Held ever wrote a letter concerning withdrawals from your capital account? A. Yes. I do recall he wrote such a letter.

Q. To whom? A. To me.

Q. What was the substance of such a letter? Do you happen to have a copy with you, by any chance? A. No, I do not.

(45) Q. Was it a registered leter? A. It didn't come by regular mail.

Mr. Galligan: You mean you got it?

The Witness: I acknowledge receiving it.

Exhibit 20

Q. Do you recall the substance of the letter, Mr. Warner? A. A. No, I don't.

Q. Do you recall whether he ever wrote a letter to a bank in which you were a depositor? A. Yes, I do.

Q. What bank? A. Security National Bank, Newark, New Jersey.

Q. What did he say to them? A. I don't recall.

Q. Do you recall the subject matter? A. No.

Q. You have no recollection as to the subject matter? A. It had to be with relation to the substitution, but I don't want to start guessing.

Q. I don't want you to guess. A. I mean, if you like. I could say—

Q. I don't want to tell you what to say.

(46) I'm sure it related to the substitution, but I can't be sure.

Mr. Genovese: I would assume you would know what it is about. You can say whatever you want on the record.

Mr. Galligan: That assumption may not necessarily be accurate.

Mr. Genovese: It may not be.

Mr. Galligan: The fact is that he knew only such a letter was written, not necessarily knowing what the content was.

Mr. Genovese: Right. I am just assuming. That's all.

By Mr. Genovese:

Q. Did you have any discussion with Mr. Hertz concerning substitution of capital in your account during the

period January through June of 1970? A. I don't recall.

Q. Do you recall telling him that you were substituting capital? A. I don't recall telling him.

Q. Are there any writings in existence, Mr. Warner, which set forth the requirements for the form in which your capital should be in the firm? (47) A. None that I know of.

Q. Did you disclose to any of the other partners of Hertz, Warner that you were substituting capital, other than Mr. Hertz? A. No, not that I recall.

Mr. Galligan: I don't think that the record reflects that he disclosed it to Mr. Hertz.

Mr. Genovese: He said he doesn't recall.

Mr. Galligan: Your question assumes beyond that, that he did.

Mr. Genovese: I stand corrected.

Q. Did there come a time, Mr. Warner, when Mr. Saluc left the firm of Hertz, Warner & Company? A. Yes.

Q. When was that? A. That would be approximately December of 1969.

Q. Do you recall the circumstances under which he left? A. Yes, I do.

Q. Would you state them, please? A. Yes. We sold our headquarters office at Two Broadway to Walston & Company. Mr. Saluc joined Walston & Company as an employee at that time of our sale of the branch office.

(48) Q. Did he receive a return of his capital from Hertz, Warner & Company? A. I believe that he did.

Q. Was there any other documentation executed in connection with his withdrawal from the firm? A. I don't recall.

Exhibit 20

Q. Do you recall whether he received a release? A. He probably did, now that you refresh my recollection, because I think all partners that retired signed reciprocal releases with the firm.

Q. Is Hertz, Warner, presently seeking to recover from Mr. Saluc any share of losses that he may be responsible for? A. No.

Q. In connection with a note that you testified you executed, who is the payee on the note? A. Hertz, Warner & Company.

Q. Are you presently acting in any capacity for Hertz, Warner & Company? A. I am making myself available to the firm in assisting it in any way that I can in the final winding up of its affairs.

Q. When did you lease Hertz, Warner & Company? A. Approximately May 1, 1970.

* * *

(82) Q. Referring to Plaintiff's Exhibit 31, which is the partnership agreement of July 1, 1969, would you look at the capital contribution to be contributed by L. Blau and J. Blau? A. J. Blau, $300,000. L. Blau, $127,000,000.

Q. Do you have any knowledge or information as to whether that is a correct figure? A. I don't recall the L. Blau, but the J. Blau looks correct.

Q. Did Mr. Hertz ever tell you that was an erroneous figure, either one of them? A. I do recall that Meyer and/or Blau contended there was an error either with themselves or some members of the family in this schedule of capital contributions, and I'm vague as to whether they were right and to what Hertz's position was relative to it.

Q. Do you recall whether or not that was the reason they would not sign the agreement? A. I don't think so,

because if—I don't believe there were any matters that were arithmetic relative to their concern. My recollection was their problems were legal and not percentage of profits and capital contributions, and so forth.

Q. Is it a fact that Mr. Meyer took the position (83) that the capital contribution for S. Meyer, which is listed there, I believe, at $440,000; is that correct? A. Right.

Q. Was in fact to be $150,000? A. I'm sorry I can't be more helpful. I do recall there were conversations in connection with the clerical presentation of certain family interests, and I don't recall the answer to that one.

Q. Do you recall whether Mr. Hertz ever conceded that in fact S. Meyer's capital contribution was overstated by $290,000? A. I don't recall how the matter was specifically resolved.

I might add, all this became academic, because we settled everything with our limited partners who were subordinated lenders and limited partners.

Q. Not to argue with you, Mr. Warner, it became academic a year after. That's what you are saying, is it not? A. (No response.)

Q. Messrs. Meyer and Blau never signed that agreement, did they? A. That's correct. To my knowledge, they never signed it, or I will go further and say they never signed (84) it was delivered it, because I think one time along the way when they were going on vacation there were allegedly copies to be sent down to us which we never saw.

Q. Just so we button this area up, you have no recollection of Messrs. Meyer and Blau at any time stating that their capital contribution is overstated in the July 1, 1969 agreement? A. Before you gave me details on your line of inquiry. I indicated to you that there was some family

situation and I have no more knowledge to advance than I have just given you.

Q. Did you participate or attend any meetings at the offices of Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison in connection with the alleged obligations that Hertz, Warner had to its limited partners and subordinated lenders? A. I didn't participate in any of the very preliminary meetings that occurred.

There was a rather formal meeting called, I would estimate, for sometime in January of 1971, when this thing was very much along the way, and I did attend that meeting with counsel.

* * *

Plaintiff's Exhibit 21

LIPKIN, GUSRAE & HELD
Attorneys at Law
225 Broadway
New York, N. Y. 10007

December 29, 1970

Arthur Winard, Esq.
475 Fifth Avenue
New York, New York 10017

Re: Henry Warner

Dear Mr. Winard:

Reference is made to your recent conversation with Mr. Hertz, the managing partner of our client, Hertz, Warner & Co. In that discussion you asked Mr. Hertz for information relative to the outstanding litigation in which Hertz, Warner & Co. (referred to in the enclosed list as registrant) was a party defendant. In addition, you requested information relative to the 1969 partnership agreement of Hertz, Warner & Co. and the signatories thereof.

Enclosed you will find two lists reflecting the information you requested. The first list reflects all litigation known to this office in which Hertz, Warner & Co. is a defendant. The second list reflects those individuals designated as partners under the 1969 partnership agreement and indicates each signatory of the 1969 partnership document with a check mark next to the appropriate name.

If you have any further questions, do not hesitate to call.

Very truly yours,

JOEL HELD

jh/jr
Encl.

Exhibit 21

GENERAL PARTNERS

Name	*Stated Capital*	*Actual Capital*	*Deficit*
√Hertz	$550,000	$407,233.93	$142,776.07
√Warner	350,000	214,888.34	335,111.66
√Carney	200,000	75,125.10	124,874.90
√Cohn	100,000	92,000.00	8,000.00
√Matthews	10,000	10,000.00	None
√R. Sadlier	10,000	None	10,000.00
√Held	5,000	1,307.31	3,492.69
√Genna	5,000	1,373.27	3,626.73
Sheldon	10,000	8,475.79	1,524.21
√Litt	10,000	6,842.70	3,157.30
√J. Sadlier	5,000	2,000.00	3,000.00

LIMITED PARTNERS

Name	*Stated Capital*	*Actual Capital*	*Deficit*
√Alfus	$330,000	$207,824.73	$122,175.27
Mitchell Alfus	10,000	10,000.00	None
Wendy Alfus ..	10,000	10,000.00	None
√Berry Trust ..	37,500	30,187.50	7,312.50
J. Blau	300,000	130,818.66	169,181.34
L. Blau	127,000	96,215.27	30,784.73
√Cannold	20,000	20,000.00	None
Feldesman	10,000	10,000.00	None
√D. Fisher	330,000	257,879.07	72,120.93
√P. Fisher	175,000	134,401.48	40,598.52
√Giffuni	10,000	10,000.00	None
√Harrison	10,000	10,000.00	None

hibit 21

Name	*ed Capital*	*Actual Capital*	*Deficit*
√Heller	$ 10,000	10,000.00	None
√Hertz, Warner & Co. Profit Sharing Trust	125,000	113,184.69	$ 11,815.31
√Hertz, Warner & Co. Foundation	125,000	57,997.61	67,002.39
Kalman	100,000	100,000.00	None
√Klein	30,000	30,000.00	None
√B. Kolberg	10,000	10,000.00	None
√R. Kolberg	10,000	10,000.00	None
√Lederman	40,000	40,000.00	None
√Lerman	75,000	75,000.00	None
Levine	220,000		
A. Meyer	300,000	62,324.00	234,876.00
S. Meyer	440,000	276,638.39	163,361.61
√Modell	20,000	20,000.00	None
√F. Moss	10,000	10,000.00	None
√H. Moss	10,000	10,000.00	None
Rothauser	150,000	142,928.75	97,071.25
Scheinman	175,000	89,151.22	None
A. Schiff	10,000	10,000.00	None
B. Schiff	100,000	100,000.00	None
√C. Schnall	10,000	20,000.00	None
M. Schnall	20,000	10,000.00	None
Schneider	112,500	49,616.38	62,883.62
M. Shuster	10,000	10,000.00	None
R. Shuster	10,000	10,000.00	None
L. Skalet	100,000	46,570.23	53,420.77
S. Skalet	10,000	10,000.00	None
F. Spector	10,000		
Strutin	10,000	10,000.00	None
Tyler	75,000		

Plaintiff's Exhibit 25

ARTHUR I. MEYER
Counselor at Law
Pan Am Building
200 Park Avenue
New York, N. Y. 10017

Hertz, Warner & Co. July 6, 1970
42 Broadway
New York, N. Y. 10004
Attn: Mr. Irving E. Hertz,
Managing Partner

Gentlemen:

Reference is made to your letter of June 24, 1970. Reference is also made to the letter dated April 3, 1970 which the undersigned and Mr. Joseph Blau wrote to you advising of the retirement as limited partners of your firm of Mr. Blau and myself and the members of our families, namely, Diana Fisher, Philip Fisher, Sydelle Meyer, Marjorie Alfus, Lawrence Blau and Sydelle Meyer as trustee of the Wendy Alfus Trust and as trustee of the Mitchell Alfus Trust (herein collectively called the "Meyer-Blau Group"), and to the conference which Mr. Blau and I had with you, at which time we delivered the letter to you and you accepted the same as notice of the retirement of the Meyer-Blau Group under the partnership agreement.

With reference to the actions which you propose to take, as outlined in your letter of June 24, 1970, please be advised (i) our interests and rights are governed by the partnership agreement of July 1, 1968, and our aforementioned letter of April 3, 1970, and (ii) we intend to enforce our rights under the agreement diligently and in accordance with the terms thereof, including the right to the return in kind of the securities which we have heretofore deposited with you under the agreement.

Very truly yours,

Arthur I. Meyer
For the Meyer-Blau Group
ARTHUR I. MEYER

AIM:gm

Plaintiff's Exhibit 27

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civ. 910

———o———

PEERLESS MILLS, INC.,

Plaintiff,

against

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Defendant and Third Party Plaintiff

against

HERTZ, WARNER & COMPANY, a partnership, et al.,

Third Party Defendants.

———o———

September 10, 1971
10:30 a.m.

Deposition of PEERLESS MILLS, INC., the Plaintiff herein, by MARGARET FINE, taken by the third party defendants, pursuant to Notice dated August 31, 1971, held at the offices of Willkie, Farr & Gallagher, Esqs., One Chase Manhattan Plaza, New York, New York, before Stewart Nissenbaum, a Notary Public of the State of New York.

(2) Appearances:

KISSAM & HALPIN, ESQS.,
Attorneys for Plaintiff
120 Broadway
New York, New York
By: ANTHONY GENOVESE, Esq., *of Counsel*

Exhibit 27

WILLKIE, FARR & GALLAGHER, Esqs.,
Attorneys for Hertz, Warner & Co.
One Chase Manhattan Plaza
New York, New York
By: JOHN C. FLEMING, Esq., *of Counsel*

LEA & GOLDBERG, Esqs.,
Attorneys for Paul Cohen
120 Broadway
New York, New York
By: MRS. LOLA S. LEA, Esq., *of Counsel*

DAVIS POLK & WARDWELL, Esqs.,
Attorneys for A T & T
One Chase Manhattan Plaza
New York, New York
By: STEVE GOLDSTONE, Esq.,
& ALLAN J. MAYER, Esq., *of Counsel*

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties hereto that the sealing and filing of the within deposition be waived; that such deposition may be signed and sworn to before any officer authorized to administer an oath; that all objections, except as to form, are reserved to the time of trial.

(3) MARGARET FINE, called as a witness by the third party defendants, being first duly sworn by Stewart Nissenbaum, a Notary Public of the State of New York, was examined and testified as follows:

Mr. Fleming: Mr. Genovese, I see that Mrs. Fine is here today, and I gather from what you said upstairs that Mr. Fine is not coming today?

Mr. Genovese: That's correct.

Exhibit 27

Mr. Fleming: Is there any particular reason why you are producing Mrs. Fine?

Mr. Genovese: I am responding to your notice to produce a witness from Peerless Mills. She is an employee of Peerless Mills and is perfectly willing to testify. I have produced the witness pursuant to your notice to examine and if you want to go forward with the examination, we are ready to go ahead. I am not going to sit here and answer any further questions, though.

Mr. Fleming: That's certainly your privilege, sir, but I am in a case which is not the typical case of a Notice of Deposition (4) having been served, and the witness having been produced. You submitted an affidavit to the court in which you indicated that Mr. & Mrs. Fine were your witnesses here and these are the people that we expected to be produced.

Examination by Mr. Fleming:

Q. May I have your name, please? A. Margaret Fine.

Q. What is your permanent address, Mrs. Fine? A. 5750 Collins Avenue, Miami Beach, Florida.

Q. Do you have a New York address, too? A. A summer address.

Q. May I have your city address? A. Summer, it is in the Nautilus Hotel, Atlantic Beach, Long Island.

Q. What is your relationship to the president of Peerless Mills? A. Wife.

Q. What is your position with Peerless Mills, Inc.? A. I think officer, secretary-treasury, vice-president.

Q. How long have you held these offices? A. At least twenty years.

Exhibit 27

Q. When was the company formed? A. Well, I can't tell you the exact time, but it has been in effect since at least—more than forty years, forty-five or more than that.

Q. How did the plaintiff, Peerless Mills, Inc. come to own shares of A T & T in the first place? A. Peerless Mills is a holding company, and they invested in American Tel. & Tel. stock.

Q. When were the two thousand shares of A T & T first purchased which you claim are the subject of your action? A. When were they first purchased?

Q. By Peerless Mills, Inc. A. I couldn't tell you the date, and they were not separately purchased. There is more stock than that, but you are interested in the two thousand shares.

Q. Are you testifying that the two thousand shares were purchased as part of a larger block of A T & T shares at one time? A. I am not sure I know the answer to your question.

Q. How did you get two thousand shares of A T & T in the first place? (6) A. How did we get it?
surely.

Q. Were they bought on the open market? A. Oh,

Q. From a broker? A. That was so long ago. Surely, it was purchased from a broker.

Q. Do you know if they were purchased on a given day when only two thousand shares of A T & T were purchased? A. No, no, they were not.

Q. So more than two thousand shares of A T & T was purchased at the same time? A. A T & T stock was purchased when Peerless stopped operating and it became a holding company. They invested money in A T & T stock.

Q. But did they buy— A. And not two thousand shares. They bought whatever—

Q. A larger amount? A. Yes.

Exhibit 27

Q. Did they buy it all at the same time, Mrs. Fine? A. Yes.

Q. And you don't know when that was? (7) A. No, I don't.

Q. About when did the switch to become a holding company take place? A. Well, at least twenty years ago.

Q. Was this durig the time when you were an officer of Peerless Mills, Inc.? A. I wasn't an officer at that time.

Q. Was your husband? A. Oh, yes. He was owner and president of Peerless.

Q. He owned all the stock in Peerless? A. Prior to that his brother, who then liquidated.

Q. Do you have any records at Peerless Mills which would disclose when these shares were first purchased? A. I don't know.

Q. Would you please check and find out if there are any records relating to the acquisition of the two thousand shares of A T & T that is the subject of your complaint. If you have any such records, would you please furnish them.

Mr. Genovese: Any such request you can direct to me.

(8) Yes, I will.

Q. Under the laws of what state is Peerless Mills, Inc. incorporated? A. The laws of Rhode Island.

Q. Has Peerless Mills always been a Rhode Island Corporation? A. Always.

Q. Where is the principal place of business? A. 5750 Collins Avenue.

Q. In Miami, Florida? A. Right.

Q. Has it always been there? A. Since we live there.

Q. Which is how long? A. We have lived in Florida about twenty years but at another address, at another address.

Exhibit 27

Q. How long has it been 5750 Collins Avenue, Mrs. Fine? A. I believe it has only been about four years at 5750.

Q. And prior to that? A. At 6575 Allison Road.

Q. For approximately how long? A. For about twenty years. We have lived down (9) there for twenty-two years or so. We lived in one home for twenty years.

Q. Prior to having its principal place of business in Flordia, where was Peerless Mills principal place of business? A. Prior to what, please?

Q. I gather your testimony is that the principal place of business of the plaintiff for about the last twenty years or so has been Florida, is that right? A. Right.

Q. Where was it prior to that, what state? A. Rhode Island.

Q. What corporate charter or by-law provisions relating to the acquisition of stock in other companies by Peerless Mills, Inc.? A. I don't know how to answer your question.

Q. Do you have a copy of the corporation's charter? A. Oh, yes.

Q. Would you produce that, please?

Mr. Genovese: It is not here.

Mr. Fleming: Will you produce that for examination?

Mr. Genovese: I don't see the relevancy. (10)

Mr. Fleming: Your complaint alleges that you are the owner of shares of A T & T stock and I am trying to establish whether or not the corporation was ever lawfully entitled to acquire shares of A T & T stock.

Mr. Genovese: It has no bearing on this suit.

Mr. Fleming: Whether it has bearing or not, sir, is a matter of determination for the court. This is a discovery proceeding, not a trial. Whether this

would be admissible evidence in a court is irrelevant. I would note that our Notice of Deposition called for the production of all these documents relating to your cause of action.

Q. What by-law provisions relate to the acquisition of stock in other companies?

Mr. Genovese: I object to the question on the ground that it is irrelevant and I direct the witness not to answer.

Mr. Fleming: I would note that for the same reasons I indicated earlier and others, we consider the question to be quite (11) relevant and we want copies of the by-law provisions produced; we want a witness produced at that time to testify as to their authenticity and as to the enactment, et cetera, of those provisions.

Q. Was there a board of directors' resolution authorizing the purchase of A T & T stock?

Mr. Genovese: I object to the question on the ground that it is irrelevant and direct the witness not to answer. Mr. Fleming, if you move to more relevant matters we can get done a lot earlier.

Mr. Fleming: I want to know how this stock was acquired. I want to know whether it was lawfully the property of Peerless Mills, Inc. or of someone else. If Peerless Mills, Inc. was not entitled to acquire it and Peerless Mills, Inc. is the plaintiff here, then Peerless Mills, Inc. has no cause of action even if somebody else might.

Exhibit 27

I would note that if the deposition is going to go on like this, and the plaintiff is going to refuse to answer questions or produce documents relating to relevant matters, (12) we are going to have very serious difficulty.

Q. Are you aware of any by-law provisions relating to the acquisition of the stock?

Mr. Genovese: I object to the question.

Mr. Fleming: Are you instructing the witness not to answer?

Mr. Genovese: Yes.

Q. Did you testify as to when Peerless Mills first got the stock? A. Did I testify?

Q. Just now, I mean. Did you say that you didn't know when Peerless Mills—

Mr. Genovese: The record will show what she testified to, Mr. Fleming. You know better than that.

Mr. Fleming: We won't have the record for a few days, sir, and the witness is here now.

Q. When did Peerless Mills, Inc. acquire this stock? A T & T stock? A. The entire A T & T stock?

Q. The entire two thousand shares of the A T & T shares that are the subject of your complaint. (13) A. I don't know.

Q. Were these two thousand shares of A T & T stock carried as assets of the corporation on its final reports for 1968, 1969, 1970, and 1971?

Exhibit 27

Mr. Genovese: Answer, if you know, Mrs. Fine.

A. Were they—

Q. Were these two thousand shares of A T & T stock carried as assets of the corporation on its final reports for 1968, 1969, 1970 and 1971? A. They were not.

Q. For any of those years? A. For not '69, certainly, probably '68.

Q. What about 1970 and 1971? A. No. Definitely not. They were not there.

Q. Do you claim that you own these shares during 1970 and 1971? A. They were—They were our stock, yes.

Q. If they were your stock, were they an asset of the corporation?

Mr. Genovese: I object to the form of the question.

Mr. Fleming: Is there some way I can rephrase it to make it acceptable, counsel? (14) Is there some basis for objection?

Mr. Genovese: That's your problem.

Q. Do you claim to have owned, you meaning, of course, Peerless Mills, Inc., these two thousand shares during 1970 and 1971? A. The answer is, yes, but they were not in our possession. They were sold.

Q. When were they sold? A. I don't know, but—

Q. Who sold them? A. Hertz, Warner. I don't know what date.

Q. When did the two thousand shares of Peerless Mills, Inc.—Excuse me, strike that. When did the two thousand shares of A T & T leave the possession of Peerless Mills, Inc.? A. I wouldn't know the day or the date.

Exhibit 27

Q. Do you know approximately when it was, Mrs. Fine? A. No, I do not.

Mrs. Lea: Were you referring to the physical possession of the stock certificates? Is that what your question was?

Mr. Fleming: This last question relates to the stock certificates, yes.

(15) A. Oh, well, they were not in our—in our possession you mean.

Q. When did they leave your possession? A. It seems to me some time in '69, 1969, I would say.

Q. I show the witness a document that's captioned "Resolution (Corporation)", and I would ask you if you identify this document? A. I do.

Q. Would you please tell us what it is and what it says?

Mr. Genovese: I object to the question. The document speaks for itself.

A. I am not a lawyer.

Mr. Fleming: Would the Reporter please mark this as an exhibit.

Last time when I deposed Mr. Mapletoft, we had Defendants' Exhibit A-1 to A-4. Start with A-5. I think that's the most logical. We will call this Defendants' Exhibit A-5, for identification.

(Whereupon, at this time in the deposition a document entitled, "Resolution" was marked Defendants' Exhibit A-5, for iden (16) tification, this date.)

Exhibit 27

Q. Mrs. Fine, with reference to the document I just showed you, at the bottom in someone's handwriting over the word secretary are the words written by hand, "Margaret Fine". Would you please tell me if that's your signature? (Indicating) A. That's my signature. Yes.

Q. What is the date appearing above your signature? A. January 8th, I believe, or 3rd. I can't read it very clearly, but it looks like the 8th, '69.

Mr. Fleming: Off the record.

(Whereupon, at this time in the deposition a discussion was held off the record.)

Q. Mrs. Fine, what is the date appearing on the document? A. October 8th—October 31, 1969. That's right.

Q. There are a few handwritten items on the document in addition to the typing at the top A. C. Fine is written in. In the middle I Margaret Fine, Margaret Fine is written in, and Peerless Mills, Inc., and also the initials R. I. for Rhode Island are written in. Are those in your handwriting as well? (17) A. Yes, they are.

Mr. Genovese: Off the record.

(Whereupon, at this time in the deposition a discussion was held off the record.)

Mr. Fleming: I gather you agree, then, Mr. Genovese, that we can stipulate that Exhibit A-5 is authentic?

Mr. Genovese: I do.

Mr. Fleming: Thank you.

Q. Mrs. Fine, I would like to show you another document at this time. It is captioned, "Securities Loan Agreement Between Peerless Mills, Inc. and Paul Cohen",

Exhibit 27

C-o-h-n. It is two pages long. Would you please examine this? A. You say examine it. Read it?

Q. Well,— A. I have seen it and I am familiar with it, yes.

Q. Would you also look at the second page with the signatures? Now, can you attest to the authenticity of the signature of A. C. Fine? A. I can, definitely.

Mr. Genovese: To save you time again, (18) Mr. Fleming, we will again stipulate to the authenticity of the document.

Mr. Fleming: Okay.

Q. Are you familiar with the signature of Mr. Paul Cohn? A. Yes, I am.

Q. Is that his signature? (Indicating) A. Yes, it is.

Q. Thank you very much.

Mr. Fleming: Would the Reporter please mark the document we have been examining here now as Exhibit A-6.

(Whereupon, at this time, the Reporter so received and so marked a document entitled, "Securities Loan Agreement" as Defendants' Exhibit A-6 for identification, this date.)

Q. Mrs. Fine, do you recall the execution of these documents that we have just marked as Exhibits A-5 and A-6? A. Do I—

Q. Do you remember the documents? A. Yes, I definitely do.

Q. Do you remember when they came into existence (19) and the fact that they were signed, et cetera? A. Yes, I do.

Exhibit 27

Q. All right. Now, speaking up to that point and time, in other words, prior to the execution of these documents, what representations were made to you and by you, of course, I mean Peerless Mills, Inc. and your husband and yourself by anyone at Hertz, Warner & Company in connection with the execution of these documents? A. No one directly from Hertz, Warner other than Paul Cohn.

Q. What did Mr. Cohn tell you? A. Regarding the money, regarding the loan, or what?

Q. Regarding the two thousand shares of A T & T stock and regarding the execution of these documents, what inducements were made to get you to sign the documents, what was told to you et cetera? A. Well, they sort of solicited Paul Cohn to become a partner in the firm and that it would require some money which was loaned to Paul in form of two thousand shares of A T & T stock.

Q. Is that all? A. Well, that's briefly all I can mention. He (20) would become a partner of the firm, but that he would have to submit or give this money to Hertz, Warner.

Q. Did Mr. Cohn say anything else, that any other representations had been made? A. To him?

Q. Yes. A. Nothing that I remember or can think of. Not that I can remember, no.

Q. Is it your testimony, then, that all Paul Cohn told you was that he wanted these two thousand shares to use as capital in becoming a partner in Hertz, Warner & Company? A. Well, he didn't specify what shares or what stock, but we thought this was very good collateral.

Q. What did he tell you that he needed? A. One hundred thousand dollars.

Q. And you made the decision to use two thousand shares of A T & T? A. Right.

Q. When did Paul Cohn first come to you about getting any sort of collateral or anything to give to Hertz, Warner

& Company? A. Again I don't remember the date. It was some time in the fall of '69. It was after he was—They (21) were married in '68, that's how I really remember the year. It was after that.

Q. Mr. Cohn was married in '68? A. Right, to my daughter.

Q. Mr. Cohn then is your son-in-law? A. Right.

Q. Did Mr. Cohn ever tell you anything about Hertz, Warner and Company? A. Well, he worked there, he worked there for many years, ten years, I believe.

Q. Did he tell you anything about the business, Mrs. Fine? A. Well, he wasn't going to—There wasn't any details about the business. It is a brokerage business, very promising, very lucrative.

Q. Did he tell you it was a very promising and lucrative brokerage business? A. We thought it was. I don't remember him saying it in specific words.

Q. Did you ask him any questions about Hertz, Warner & Company? A. Did we ask him?

Q. Yes, or about the transaction whereby he might become a partner? (22) A. Did we ask him about it?

Q. Yes, do you recall looking into the matter, in other words? A. We took his word or whatever he felt—If he felt that it would promote or better his situation, we were very—we were pleased to do it.

Q. Did Mr. Cohn ever tell you that prior to 1969 he had been a partner in Hertz, Newmark & Warner? A. Prior to that, many years prior to that.

Q. Well,—A. Are you referring to?

Q. Well, to a period starting in 1963. A. Yes, before we knew him.

Q. In other words, he told you before 1969 that some time prior to that he had been a partner in Hertz, Newmark & Warner? A. Yes.

Exhibit 27

Q. Did you know at the time you signed these agreements marked Exhibit A-5 and A-6 that Mr. Cohn had been working for Hertz, Warner for some period of time and had been a partner there at one time? A. Yes. Yes.

Q. Did Mr. Cohn say that anything specific had been said to him by either Irving Hertz or Henry (23) Warner in connection with Mr. Cohn becoming a partner in 1969 again in Hertz, Warner & Company? A. Yes.

Q. What? A. I can't quote. They approached him to become a partner, invited him, approached him, solicited him. I don't know what else you want me to say.

Q. Well, in substance, what was it that he said that Mr. Hertz and/or Mr. Warner told him? A. He would—Well, when one enters a partnership you hope it will be your business. He is a very conscientious person, works long hours, and it looked like a very profitable, very good thing for him to become a partner since he worked as hard as though he were a partner anyway without the compensation.

Q. Is that what he said that Mr. Hertz and Mr. Warner told him? A. No. Oh, they always patted him on the shoulder what a wonderful boy he was, that came back to us, yes.

Q. Did he say that Mr. Hertz or Mr. Warner had made any specific representations to him about the business? A. I don't know.

Q. What was your primary motivation in giving Mr. (24) Cohn the stock? A. To become part of—a partner, as they suggested.

Q. Were you relying— A. Certainly not giving them a present.

Q. Were you relying on his judgment as to the— A. I was. I, we.

Q. The agreements we have been talking about, the documents marked as Defendant's Exhibit A-5 and A-6,

each bear the date October 31, 1969. Is this approximately the time that the stock certificates were turned over to Hertz, Warner & Company? A. Yes.

Q. After that time, in respect to the two thousand shares of A T & T stock that were given to Mr. Cohn, were any shares which you would regard as substitution or replacement of those shares, did Peerless Mills, Inc. receive any dividends on A T & T stock? A. Yes, they did receive.

Q. After October 31, 1969? A. Yes.

Q. How were these received, in what way, how did they come to the possession of Peerless Mills, Inc.? (25) A. They were sent by check as usual from the telephone company.

Q. Directly from A T & T? A. Directly from A T & T for a short time.

Q. How long, approximately? About how long? A. Let me see. The dividends are sent quarterly, are they not?

Q. I don't represent A T & T.

Mr. Goldstone: I do and I don't know.

A. I remember receiving one or two—

Q. Unfortunately I don't own any A T & T, Mrs. Fine.

A. Did you say fortunately.

Q. Unfortunately. A. Oh, yes. I understand. I do and I know it is—I know we received either one check in dividend form.

Q. Sent directly to you by A T & T? A. But at a later date it came from Hertz, Warner.

Q. Did they then come after that on a regular basis, like every quarter from Hertz, Warner? A. Well, it didn't come that long. Yes, for a while, for not too long a time. We thought it was very (26) strange when the dividends came not directly. We thought it was very strange that we shouldn't get it directly from the telephone company.

Exhibit 27

Q. Did you say anything to Paul Cohn about this. Mrs. Fine? A. Yes.

Q. What did he say? A. I don't know.

Q. When did you stop getting the dividend checks through Hertz, Warner & Company? A. I can't tell you when.

Q. Approximately, do you have any idea at all? A. Some time in 1970, at the end of 1970, I believe.

Q. When dividend checks stopped coming, did you make any inquiry of Hertz, Warner & Company or Paul Cohn? A. Yes, we did.

Q. What was the nature of that inquiry? A. Well, we called the telephone company up. We phoned them and wrote—We confirmed the conversation by letter to a Miss —I don't even know her name now—asking that the telephone—that the stock not be transferred to anyone.

(27) Mr. Fleming Off the record.

(Whereupon, at this time in the deposition a discussion was taken off the record.)

Q. Mrs. Fine, I show you a document that had previously been marked in another deposition as Exhibit No. 4, and I ask if you can identify this, a document captioned at the top with the return address of Peerless Mills, Inc. and purportedly signed by A.C. Fine. (Indicating) A. I remember this very well.

Q. Is that Mr. Fine's signature? A. It is.

Q. Is that the document you were referring to earlier when you said you sent a communication to A T & T? A. Right.

Mr. Fleming: We have decided to continue referring to this document by its original exhibit num-

Exhibit 27

ber, Plaintiff's Exhibit No. 4, in order to avoid multiple stamping of the document.

Q. Were there any other communications with A T & T besides this? (28) A. I don't think so.

Q. The first line of this letter refers to oral instruction of July 7th, 1970. Is that the telephone call to A T & T? A. Right.

Q. What did A T & T tell you at that time about the dividend or about the stock? A. Well, they would conform with our request.

Q. What request? A. According to the letter—The letter is self-explanatory.

Q. Your request to stop transfer on the stock, is that right? A. Right.

Q. Did they tell you whose name the stock was registered in at that time? A. No, I don't believe so. I don't think so.

Q. In addition to getting in touch with A T & T, did you contact Mr. Paul Cohn about this? A. Yes.

Q. What did he say? A. He was upset about it, but exactly what he said, I don't know.

Q. Did you know at that time that the shares had (29) been at any time transferred into the name of Hertz, Warner & Company? A. We didn't know, but having received our dividend check through the company, we were suspicious

Q. By "through the company", you mean through Hertz, Warner & Company? A. Hertz, Warner & Company. We were suspicious. It wasn't through the regular channel and we were getting worried about it.

Q. Suspicious of what, that it had been transferred into Hertz, Warner's name? A. Yes, that's right.

Exhibit 27

Q. What did you do about that, then? This was at the earlier period when you were getting the checks from Hertz, Warner? A. Physically didn't do anything. Oh, we decided that it was time to see an attorney, and get some help.

Q. Well, did you aproach Hertz, Warner & Company? Did you write to them or talk to them? A. No.

Q. Does Peerless Mills, Inc. have any record of the receipt of dividends on the two thousand shares of A T & T from October 31, 1969 into the present? (30) A. Do they have a record of having dividends?

Q. Received—What happens when a dividend check comes into Peerless Mills, Inc.? A. Of course everything is recorded.

Q. Can those records be produced?

Mr. Genovese: I will take that request under advisement.

Q. Did Peerless Mills, Inc. pay corporate taxes on these dividends? A. If corporate taxes are necessary to be paid, they were paid. We have an accountant for that purpose, you see.

Q. Who are your accountants? A. Jacobs & Furman.

Q. Where are they? A. They are at 10 East 40th Street. They have moved recently, that's why I hesitate.

Q. Is that New York City? A. Yes.

Q. How long have they been your accountants, approximately? A. In the entire life of Peerless.

Q. Do you know what Peerless Mills fiscal year for tax purposes is? (31) A. July.

Q. Ending July 1st? A. The end of July, I think.

Q. It ends July 31st? A. The fiscal year is July 31st, I believe.

Exhibit 27

Q. Is Peerless Mills, Inc. publicly held, Mrs. Fine? A. No. Privately.

Q. What filings does Peerless Mills, Inc. make if any with the SEC, the Securities & Exchange Commission, that is? A. I don't believe they make any filing with them, to my knowledge.

Q. Does Peerless Mills, Inc. make any filings with any state security authority anywhere in the country? A. I don't know. With any state?

Q. Securities authority. You know the securities divisions or similar authorities in any state like Rhode Island or Florida or New York. A. I really don't know—you know, I don't know how to answer it. I don't know the answer.

Q. If Peerless Mills has any records of any such filings or any with respect to the fact that filings are made, could these be produced, please? (32) A. Yes, if they—

> Mr. Genovese: Just direct your request for documents to me and I will take each one of them under advisement.

Q. So far we have been talking to some extent about the dividends that Peerless Mills, Inc. received on the A T & T shares after they were turned over to the Hertz, Warner & Company on approximately October 31, 1969. Did Peerless receive any warrants during this period in connection with those shares or the ownership of those shares? A. I really don't know the answer to your question. Peerless received warrants, but I do not really know whether that included the two thousand shares, hardly.

Q. Did you receive any warrants or any payment for warrants sent to you from Hertz, Warner & Company, Mrs. Fine? A. No.

Q. Never? A. No, payment of warrants? I don't think they were issued during that time. I don't know.

Exhibit 27

Q. Does Peerless Mills, Inc. at the present time or at any time in the past have or did it have an account (33) with Hertz, Warner & Company? A. Did they transact any business prior to that is your question?

Q. Well, the question is, at any time in history, from—at any time at all did Peerless Mills, Inc. have an account with Hertz, Warner & Company?

Mr. Genovese: You mean a customer's account?

Mr. Fleming: Any sort of account, any sort.

A. I think there was an account, some transaction. We never knew of Hertz, Warner before '68, and since we don't buy and sell stock, too much stock, you know, I—There was some little transaction, but I really don't know specifically which or what.

Q. Do you have a regular broker for Peerless Mills, Inc.? A. Well, we live in Florida most of the time, so it wouldn't be from Hertz, Warner.

Q. Do you have someone you ordinarily go to, Mrs. Fine? A. Yes.

Q. When you want to trade securities? A. Yes, we do in Florida.

(34) Q. Where does Peerless Mills maintain its brokerage account, with what brokerage house?

Mr. Genovese: I object to this. I don't see the relevancy.

A. When—

Mr. Genovese: When I object you don't answer.

Mr. Fleming: Well, really, I don't think that I am required to explain in detail the relevancy of everything.

Mr. Genovese: You are not.

Exhibit 27

Mr. Fleming: If payments come in from somebody who is not the regular broker for a corporation, it would be a cause for inquiry on somebody's part at the corporation. If you have an account with Smith & Jones and you regularly get checks from them, it is not surprising—

Mr. Genovese: We will be perfectly willing to stipulate whatever you want to know in this regard. If you want to know what payments Peerless Mills received, I will be able to get those facts for you. I am sure. No problem.

(35) Mr. Fleming: Fine. Okay.

A. They don't have a brokerage, anyway. They don't even have one.

Mr. Genovese: Just—

Q. I just want to pin this down. Do you recall ever executing any documents or your husband or anyone at Peerless Mills ever executing any documents to open up a brokerage account with Hertz, Warner & Company of any sort? A. No.

Q. Did you receive any statements of account from Hertz, Warner & Company? You mentioned you got dividend checks. Did you get anything in the nature of a statement? A. I think so.

Q. If you have copies of those statements or have other communications from Hertz, Warner & Company, would you please produce them?

When you made this transaction about October 31, 1969, and two thousand shares of A T & T were turned over to Paul Cohen or turned over to Hertz, Warner & Company, did you get any collateral from Paul Cohen? A. Just an agreement.

Exhibit 27

Q. In other words, just the paper that we have (36) already had marked as exhibits? A. Right.

Q. But he didn't give a mortgage or do anything like that? A. No, this was to be—This was really to be collateral.

Q. Strictly on his signature, in other words? A. Yes.

Q. Has Peerless Mills, Inc. made any efforts to collect on its loan from Paul Cohn? A. No, I guess.

Q. No lawsuit or anything have been brought against Paul Cohn? A. No.

Q. Has a demand been made against Paul Cohn that he pay over two thousand shares to Peerless Mills, Inc.? A. Where would Paul Cohn have the money to pay it?

Mr. Genovese: Just answer the question.

A. No.

Mr. Genovese: Mr. Fleming, could we take five minutes to give Mrs. Fine a rest?

Mr. Fleming: Sure, fine.

(Whereupon, at this time in the deposition a five minute recess was taken.)

(37) (Whereupon, at this time, after a five minute recess the deposition continued as follows:)

Examination by Mr. Fleming Continued:

Q. Mrs. Fine, after Peerless Mills, Inc. transferred two thousand shares of A T & T— Strike that. After Peerless Mills, Inc. turned over two thousand shares of A T & T to be used by Paul Cohn on or about October 31, 1969, did shares of A T & T ever come back into the possession of Peerless Mills, Inc., speaking now about the two thousand shares or any replacement shares? A. Well, when the

shares were turned over, they were in the name of Peerless Mills and to our knowledge,—and it was—we didn't expect that it would be in any other name but Peerless Mills at all time.

Q. Referring back now to the securities loan agreement, which we marked earlier as Defendants' Exhibit A-6, had you read this agreement in October 31, 1969? A. Yes.

Q. Did you read the second paragraph of the agreement that, "Peerless Mills, Inc. do not reserve or retain any property right in the cash and stock loan but (38) their rights hereunder shall consist solely of the contractual right against Paul Cohn individually to the repayment of said loan in the manner hereinabove specified, and the firm—is identified as Hertz, Warner & Company—shall not be under any liability to Peerless Mills, Inc. by reason of this agreement, nor shall it be under any obligation whatsoever to Peerless Mills, Inc. on account of said cash and stock or any interest thereon, stock dividends or rights received by Paul Cohn or the firm."

Were you aware of that section in the agreement? A. I am afraid I wasn't.

Q. This is the agreement though that Mr. Fine signed? A. Yes, it is.

Q. You say you didn't expect that the shares would ever leave the name of Peerless Mills, Inc. Did you ever find out that they had left the name of Peerless Mills, Inc.? A. No.

Q. Were you ever told by Paul Cohn or anyone else that the shares had been transferred into the name of Hertz, Warner & Company? (39) A. No, we were not told.

Q. Mrs. Fine, did you or your husband or anyone else at Peerless Mills, Inc. have any knowledge that on or about

Exhibit 27

May 1st, 1970, two thousand shares of stock in AT&T, which had been in the name of Hertz, Warner & Company, were transferred into the name Peerless Mills, Inc. on the books of AT&T? A. The beginning of your question was did I know you say?

Q. Did you or your husband or anyone at Peerless Mills, Inc. come into any knowledge either then or since— A. No.

Q. Did you ever purchase shares of AT&T through Hertz, Warner & Company? A. No.

Q. Do you have any explanation for why Hertz, Warner & Company might want to transfer shares into your name on May 1st—

Mr. Genovese: Objection to the form of the question.

Q. In other words, this transfer of shares from Hertz, Warner to Peerless Mills, Inc. was something that Peerless Mills, Inc., when it occurred on (40) May 1st, 1970, and even subsequently, the transfer from the name Hertz, Warner to Peerless Mills was something that Peerless Mills had no knowledge of? A. That is right. How did it get into the name of Hertz, Warner?

Mr. Genovese: Just answer. Don't ask questions.

Mr. Fleming: Off the record.

(Whereupon, at this time in the deposition a discussion was held off the record.)

Q. In regard to the period on and after October 31, 1969, in other words, from around the time that this agreement was entered into with Paul Cohn, since that time, did

anyone at Hertz, Warner & Company make any representations to Peerless Mills as to what would be done with the two thousand shares of AT&T that were covered by the agreement of October 31, 1969? A. No.

Q. They just simply said nothing? A. That is right.

Q. In regard to the events leading up to the execution of those documents which were identified as Defendants' Exhibits A-5 and A-6, the corporate reso (41) lution and the securities loan agreement, did Paul Cohn give you or your husband or anyone at Peerless Mills, Inc. anything in writing? Did he write letters asking for the shares or asking for one hundred thousand dollars, Mrs. Fine? A. No.

Q. How was this done, all by telephone or— A. Yes, verbally.

Q. Was it by telephone or in person? A. In Person.

Q. Where? A. In Florida.

Mr. Goldstone: Excuse me. Could I hear the question again.

(Whereupon, at this time, the Reporter so read back the last previous question which was asked.)

Q. Did Paul Cohn ever give you any explanation as to how the figure of one hundred thousand dollars as his share of capital had been arrived at? A. No.

Q. Did he say that he was ordered to produce this as a prerequisite for becoming a partner in Hertz, Warner, Mrs. Fine? (42) A. Yes.

Q. Did he tell you that he suggested the figure to Mr. Hertz and Mr. Warner or they suggested it to him? A. My knowledge is, they suggested it to him. That's my knowledge.

Exhibit 27

Q. Did you ever make any inquiry of him as to whether or not the hundred thousand dollars was an appropriate amount or whether it should be something more or something less? A. No, no.

Q. When you and Mr. Fine signed the papers marked Defendants' Exhibits A-5 and A-6, the securities loan agreement and the resolution, were you aware that Mr. Paul Cohn had been a partner in Hertz, Warner & Company since July 1st, 1969? A. Repeat that, please.

Q. The resolution and the securities loan agreement are dated October 31, 1969. A. Yes.

Q. Were you aware that Mr. Cohn had become a partner of Hertz, Warner as of July 1st, 1969?

Mr. Genovese: I object to the form of the question.

Mrs. Lea: I object to the form.

(43) Q. When the agreements were executed on October 31, 1969, was it your belief at that time that Mr. Paul Cohn was already a partner in Hertz, Warner & Company, or did you believe that he was to become a partner in Hertz, Warner & Company in the future? A. My belief was that he was to become a partner in the future.

Q. What did he tell you on that subject? A. Paul Cohn?

Q. Yes. A. What was there necessary to tell us other than that he needed the security—the collateral, the loan and that he would be made a partner.

Q. When did he first tell you that he would be made a partner? A. When?

Q. Yes. A. I don't know the date. I don't remember th time.

Q. .o try to put this thing in some sort of a time perspective that will make it easier to remember, the agreement and the resolution say October 31, 1969. A. Right.

Exhibit 27

Q. Now, approximately how long before that did (44) Paul Cohn first come to you about his being a partner in Hertz, Warner & Company? A. There was conversation on it for some time, but it didn't actually come to a head until around about that time, October, some time around the fall, like around Thanksgiving.

Q. Can you be a little more precise about some time. Was it several months or just a week, or what was it? A. No, not several months. Several weeks, we might say. I say around Thanksgiving because they were visiting there. They were visiting us in Florida at the time.

Q. You mean Thanksgiving of '69? A. Yes.

Q. You mentioned that these discussions took place in Florida? A. Yes.

Q. When did you go to Florida that year, do you recall that? A. We are always in Florida in October.

Q. Well, that's probably a very smart idea, but when did you go down there—Were you in Florida in the summer of that year, in other words? (45) A. The summer of that year?

Q. Yes. A. We are never there in the summertime.

Q. Another smart move. When did you go down in '69? A. In October.

Q. You usually go down in October? A. Yes, that is right.

Q. To the best of your recollection, did you probably go down in October of 1969? A. Without a doubt.

Q. Would you say that probably the first approach that Paul Cohn made to you was October of 1969? A. As I say, there was talk about it before, but nothing—

Q. Was that talk in New York or was that talk in Florida? A. Oh, I don't know. I don't know.

Exhibit 27

Q. In the few months previous to October 31, 1969, did Paul Cohn talk to you or write to you at all about what he was doing? Did he talk to you or write you what he was doing at Hertz, Warner & Company at that time? A. '69?

(46) Q. Right. A. Well, Paul Cohn was manager of the syndicate department at Hertz, Warner.

Q. You mean before he became a partner, is that right? A. Right.

Q. Did he mention anything else he was doing? A. No.

Q. Did he ever mention something called the cage, c-a-g-e? A. No. I don't even know what it means, to be honest with you.

Q. Did he ever tell you he was doing some work in the back office of Hertz, Warner? A. Yes, that was later, yes, afterwards.

Q. What do you mean by "later", when did he tell you he was working in the back office? A. We knew he was working in the back office, when he was working in the back office.

Q. Do you have an approximate time? Was this before you signed this agreement? A. Oh, no. It must have been after. I would say after.

Q. Did Paul Cohn ever tell you that things didn't (47) look so good at Hertz, Warner & Company, that he was having worries about the business or that the business wasn't doing as well as he hoped or anything like that? A. It didn't look very good to any of us when they were closing their branches and letting help go.

Q. When was this? About when was this? A. I don't have dates. I don't have records. I didn't have records. It was after this. This October 31st.

Q. Approximately how long after? A. Not too much after. I know he was in that back office cleaning up a lot

of mess for months, and all this time, of course, it was—He was left with one other young man there.

Q. Who was that, do you know? A. I don't know. I think his name is Bob.

Q. Has he told you that he has left Hertz, Warner & Company? A. He was fired.

Q. When did he tell you he left Hertz, Warner & Company? A. He didn't tell us he left Hertz, Warner. He was fired and we were there when it happened. Not at Hertz, Warner, but we were at the house when he came in.

(48) Q. When was that in terms of time? A. It was in the fall of—This '71?

Q. Yes. A. '70. It was around, about this time about a year ago, perhaps. He was ordered out.

Q. Did he say why? A. No.

Q. Did he say anything about the two thousand shares of A T & T? A. No.

Q. Did you ask? A. No.

Q. Subsequent to then, did you make any inquiries as to the two thousand shares? A. Who would we ask? No. We knew the shares were sold.

Q. By whom, when? A. The telephone company, Hertz, Warner or whoever. I don't know.

Q. What did you learn about the shares and when did you learn it? A. There isn't anything else to relate, only that the shares were gone, they were not there, that they were sold.

(49) Q. How did you come to learn this? Did someone at Hertz, Warner tell you, someone at the telephone company tell you, or what? A. I don't know how we got the information or how we got to know about it.

Q. Did you ever write to Hertz, Warner & Company to ask for the return of the shares? A. No.

Exhibit 27

Q. During the year 1969, up to October, when these agreements were executed, did Mr. Cohn tell you that he was very active in the business of Hertz, Warner & Company? A. We know he was active. He didn't probably tell us in his own words, but by the hours that he had kept.

Q. You knew at that time that he was very busy there? A. Yes, right. The first one in and the last one out.

Q. Mrs. Fine, for the period starting in 1969 through the present, does Peerless Mills, Inc. have records of all of its holdings of A T & T stock and related securities of the American Telephone & Telegraph Company? (50) A. Do they have records?

Q. Of holdings throughout that period. A. Of course they do.

Q. Would you produce those, please. Do you happen to know if the records are kept by certificate numbers or by shares? A. Our accountant takes care of everything.

Mr. Fleming: Well, based on some of the items that I have called for today, I may have further questions in connection with this case and this matter. But as of now, since apparently none of these records have been brought with the plaintiffs today, in light of the fact that this has gone on for some time, I have no further questions at this time, and I will have to examine the documents in question before I can pursue the matter further.

(Whereupon, the deposition was adjourned sine die.)

Subscribed and sworn to before me this ..... day of ....., 1971.

.....

Notary Public

Exhibit 27

(51) STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

I, STEWART NISSENBAUM, a Notary Public within and for the State of New York, do hereby certify:

That MARGARET FINE, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF I have hereunto set my hand this 14th day of October, 1971.

STEWART NISSENBAUM

.....

Stewart Nissenbaum

Exhibit 27

(52) WITNESS INDEX

Name	PAGE
Margaret Fine	3

EXHIBIT INDEX

Defendants	PAGE
A-5 (id)—Document entitled "Resolution"	15
A-6 (id)—Document entitled "Securities Loan Agreement"	18
Plaintiff	
4 —Communication with AT & T	27

Defendant Third-Party Exhibit A

FINANCIAL STATEMENT OF HERTZ, WARNER & CO.

November 2, 1969

(PHOTOSTAT)

(See opposite ☛)

December 29, 1969

Hertz, Warner & Co.
New York, New York

We have examined the statement of financial condition of Hertz, Warner & Co. as of November 2, 1969. Our examination was made in accordance with the regulations prescribed for audit by the New York Stock Exchange and with generally accepted auditing standards. It accordingly included a review of the system of internal control and the procedures for safeguarding securities and such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the accompanying statement of financial condition presents fairly the financial position of Hertz, Warner & Co. at November 2, 1969, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

Robert Mirsky & Co., CPA

Financial Statement

NOVEMBER 2, 1969

Hertz, Warner & Co.

TWO BROADWAY, NEW YORK, N.Y. 10004

New York Stock Exchange
American Stock Exchange
Philadelphia-Baltimore-Washington Stock Exchange
Midwest Stock Exchange
National Stock Exchange
Boston Stock Exchange
Pacific Coast Stock Exchange

Hertz, Warner & Co.

STATEMENT OF FINANCIAL CONDITION

As of November 2, 1969

ASSETS

Current Assets		
Cash (Includes $353,000 clearing fund deposits)	$ 2,048,717	
Drafts with securities attached deposited for collection	1,571,807	
Receivable from brokers and dealers	15,447,456	
Receivable from customers on secured and cash accounts	19,281,032	
Market value of securities owned:		
United States Government, state and municipal bonds	1,446,170	
Other securities	9,755,588	
Current assets	212,040	
Total Current Assets		$49,762,810
Other Assets		
Investment in corporate affiliate		2,000,000
Exchange memberships at market value		1,415,000
Furniture, fixtures and equipment (net of accumulated depreciation of $138,226)		281,074
Miscellaneous assets		12,500
Total Other Assets		3,708,574
Total Assets		$53,471,384

LIABILITIES AND CAPITAL

Current Liabilities		
Collateralized bank loans	$23,775,000	
Uncollateralized bank loans	1,430,511	
Payable to brokers and dealers	11,308,606	
Payable to customers:		
Free credit balances	1,198,980	
Fully secured and cash accounts	3,455,289	
Market value of securities sold for firm account	765,297	
Current liabilities	1,251,185	
Total Current Liabilities		$43,184,868
Capital		
Subordinated loans payable	4,383,715	
Capital	5,902,801	
Total Capital		10,286,516
Total Liabilities and Capital		$53,471,384

Defendant Third-Party Exhibit B

SECURITIES LOAN AGREEMENT

between

PEERLESS MILLS, INC. & PAUL COHN

Peerless Mills, Inc. has this day loaned to Paul Cohn 2,000 shares common stock of the American Telephone & Telegraph Co. Paul Cohn may contribute the same to the firm of Hertz, Warner & Co. (hereinafter referred to as the "Firm") as a contribution of capital by him, or make the same available to the Firm as part of the Firm's assets and such securities may be held, pledged, sold, transferred, disposed of or otherwise dealt with by the Firm as partnership property in like manner as though Paul Cohn had so contributed or made available his own securities. Paul Cohn individually undertakes and agrees that on November 1, 1970, he will repay said loan by returning to Peerless Mills, Inc. a like amount of stock or cash and will pay or assign to Peerless Mills, Inc. the amount of any cash or stock dividends or rights which Peerless Mills, Inc. would otherwise lose by reason of the transaction evidenced hereby. Unless otherwise specified in writing, by November 1, 1970, this agreement shall automatically be extended for an additional one-year period. Peerless Mills, Inc. shall have the right to have returned to them by Paul Cohn at any time on demand securities of the same kind and amount as any of the securities enumerated in this agreement, provided that he assigns and delivers to Paul Cohn in place thereof, other securities of equal market value or cash equal to the market value of the securities so returned, and all the provsions of this agreement shall apply to such substituted securities or cash to the same extent as though they or it were all or part of the securities initially loaned.

Exhibit B

Peerless Mills, Inc. does not reserve or retain any property right in the cash and stock loaned but their rights hereunder shall consist solely of the contractual right against Paul Cohn individually to the repayment of said loan in the manner hereinabove specified; and the Firm shall not be under any liability to Peerless Mills, Inc. by reason of this agreement nor shall it be under any obligation whatsover to Peerless Mills, Inc. on account of said cash and stock or any interest thereon, stock dividends or rights received by Paul Cohn or the Firm.

The term "the Firm", as used in this agreement shall mean the firm of Hertz, Warner & Co., as presently constituted or as it may be hereafter constituted from time to time and also any firm which may succeed to its business.

Paul Cohn

.....

PAUL COHN, Borrower

Peerless Mills, Inc.

.....

PEERLESS MILLS, INC.

By: A. C. Fine

.....

A. C. FINE, President

[SEAL]

Dated: 1/31, 1969

Third-Party Defendant's Exhibit K

To:

All Partners, Branch Managers and Account Executives

From:

Henry Warner

Hertz, Warner & Company has decided to "change its spots." We intend to concentrate our talents, energy and capital in the professional areas of the brokerage business as follows:

1. Investment Banking
2. Institutional Sales
3. Investment Advisory
4. Arbitrage
5. Market Making

We will consolidate our retail activities at Two Broadway where we accommodate about seventy Account Executives. We plan to permit our managers together with their Account Executives in the branches to negotiate new arrangements. The firm will assist in every way humanly possible to make the transition a smooth one.

Hertz, Warner & Company intends to maintain two memberships on the New York Stock Exchange, three on the American and one each on the Boston, Philadelphia-Baltimore-Washington, Midwest, National and Pacific Coast Stock Exchanges. The full clearing operations will be retained to attend the new "product mix."

Date: January 27, 1969